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ABSTRACT

These conference papers concern the problems and issues that face public administrators when the extension of collective negotiations go beyond the private sector. The papers analyze the legal context of collective negotiations, unit determination problems, the negotiation process, dispute settlement, and the impact of negotiations on administrative policy and practice. One paper focuses on negotiation issues in public education and another discusses the school superintendent's role in collective bargaining. (Author/JF)

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Collective Negotiations and Public Administration

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AND
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Foreword

On March 24-26, 1970, a conference was held at The University of Iowa in Iowa City on Collective Negotiations and Public Administration. Funded in part through a grant from Iowa Community Services under Title I of the Higher Education Act of 1965, this conference sought to provide a forum for the discussion of the problems and issues facing public sector administrators which have resulted from the extension of collective negotiations beyond the private sector.

Iowa is perhaps typical of that group of states which do not have comprehensive legislation regulating public sector collective negotiations. Despite recent court rulings in the state, there is still considerable uncertainty as to the rights and obligations of public employees and employers regarding collective negotiations. Despite this uncertainty, employee groups are seeking recognition and considerable negotiation is taking place.

The purpose of this conference was to analyze this new dimension of public employee relations and its impact on the public administrator. The program sessions sought to analyze the phenomenon of public employee organization, the legal context of collective negotiations, unit determination problems, the negotiations process, dispute settlement, and the impact of negotiations on administrative policy and practice. Session leaders discussed developments in Iowa as well as in other states.

This publication represents a major portion of the sessions on this conference. While all of the program sessions could not be included in this proceedings, most of the major issues discussed are covered here.

The Center for Labor and Management expresses its appreciation to the speakers, workshop leaders, and discussants for their excellent work on this conference and for their contributions to this publication. In addition, the assistance of Iowa Community Services and that of organizations supporting the Center's research and publications program is gratefully acknowledged.

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The Public Employee and the Public Employer

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This is my second visit to the heartland of America in recent weeks. Last month I was in Chicago for a similar course with a group of public employers. Not unexpectedly, I heard some reflections on the work habits of some city and county employees, but when the coffee-break time came, I found that the employer-students were as zealous about respecting these amenities as their employees. I suspect the moral is that under the skin we're all rest-oriented first and work-oriented second.

I have always wanted to spend some time in Iowa, particularly after seeing the great musical, "The Music Man." But let me reassure you, I don't come here as Professor Harold Hill to sell you some magic lessons that will enable you to become the toast of the town, nor do I plan to run off with your librarian—my wife wouldn't like that, nor, I suspect, would the librarian. Rather, I come to all these courses as a fellow student, for there is much to be learned.

The University of Iowa is to be congratulated for having the foresight and initiative to gather such a distinguished faculty and a fine turnout of students. Throughout the country there are more and more such programs being offered under the auspices of universities, professional organization, state municipal leagues, and other public interest groups. This is all to the good, and a major objective of our new Service is to encourage and assist in the development of even more such training programs.

I might just take a minute to deliver a brief commercial about our Service. It is sponsored by three national organizations—National League of Cities, United States Conference of Mayors, and National Association of Counties —and has three initial objectives. First, to supply training and training materials, set up workshops and assist members of cooperating organizations and institutions in setting up workshops and seminars for public officials. Second, to provide information useful to these officials on labor contracts, public employment law, and current labor-management trends. Third, to sponsor and conduct research on how to alleviate problems presented by collective negotiations in the public sector and compile experience reports and case studies for dissemination to public employers.

To carry out this program we are considering a number of projects to help bring together much of the resources of information, education, and expertise already developed in the public sector, and will develop some new materials to assist public employers and public administrators. The program's development will be guided by an advisory council, which includes representatives of the three national organizations sponsoring it, the International City Management Association, the Public Personnel Association, and also the Council of State Governments, the Dispute Settlement Center of the American Arbitration Association, the Federal Mediation and Conciliation Service, and several university representatives. We shall not be lacking for good advice and that ought to help us provide sound information for all of you.

If one looks realistically at the nation's cities and counties, there can be little doubt about the need for improved employee development. The governing bodies in America's urban society face monumental problems whose resolution requires herculean efforts. The demand for decent housing, jobs that go someplace, traffic that can move, and water and air fit for human consumption is becoming increasingly audible and visible. City fathers, faced with severe fiscal problems resulting from a heavy concentration of population in a circumscribed area and an exodus of substantial personal and corporate tax revenues are truly caught in a swirling whirlpool. If needs are to be met, tax rates must go up and then the moving firms find new business knocking at their door. As one mayor put it to me, "My city's problem is not so much renewal—it's downright survival."

In these circumstances, municipalities need officials with the genius of Einstein, the determination of a Fuller Brush Man, and the patience of a housewife waiting for bacon to return to 50 cents a pound. Yet traditionally, they have not been able to offer the kind of salaries that can recruit such unusual talent and they have been hard put to retain many skilled, hard-working white- and blue-collar workers in the face of economic opportunities elsewhere. True, there is inadequate recognition of the value of the entire package of fringe benefits and job security protection accorded municipal employees, and this needs increased attention.

In days to come, the problem of attracting and encouraging capable people may intensify for city, county, and state governments are expected to be one of the nation's greatest growth industries in the decade of the seventies. A 40 per cent increase has been predicted and even as soon as 1975, one of every six workers in the country is expected to be on a government payroll. The magnitude of problems to be tackled and the major expansion necessary to do so will place local government under severe strain.

Another aspect of urban personnel relations is that the elected public employer, whether he be mayor or county official, after learning the dos

and don'ts of dealing with city employees, sometimes finds that the tenure accorded his employees is not extended by the voters to himself. I have been told that fully half of the mayors in city halls this year are in their first term, and some are forced to learn the hard realities of employer-employee relations in overnight instant education. Employee tensions, some frustrated and built up by months of official avoidance, will not always await proper on-the-job education of public employers in the philosophy and practice of collective negotiations.

Some government leaders, relying on the legal prohibition against employee strikes and accustomed to long, long years of uninterrupted service by city employees, have been lulled into a false security and have given labor-management relations a low priority among the many demands being made on their time and energies. The truth of the matter is that civil service, legal prohibitions and penalties to the contrary, slowdowns and strikes are happening in the public sector, and in increasing amounts. In 1958, there were 15 work stoppages by public employees, involving 1,720 workers and 7,250 lost man-days. Ten years later, in 1968, there were 254 stoppages, involving 201,800 workers and 2,545,200 lost man-days. True, the presence of legal prohibitions and penalties is a deterrent to many more stoppages, but the mayor who thinks "it can't happen here" may some day face a "happening" on his doorstep, and it may not be a birthday party.

But even putting aside the pressures of illegal conduct, the unmistakable trend of legislation enacted by the states in the past decade has been toward permitting more representation for employees on state and city payrolls. While the extent and type of authority granted varies a great deal, there have been no real efforts at reducing such powers. Indeed, in many communities, governing bodies and employee associations or unions have been carrying on collective negotiations for many years without any specific state-enabling legislation on the books.

One does not need binoculars to see that employees are joining employee associations and unions in increasing numbers and that the employee associations are taking on more and more of the policies and militancy of the traditional labor unions. In the two-year period—1966 to 1968—public unions increased their membership by 436,000, bringing the total to 2,200,000 federal, state, and local employees. In the ten-year period—1958 to 1968—public union membership doubled and there is no sign of a decline in activity. The upsurge in public employee unionism is setting the pace for the entire labor union movement. There is a report that one union has been so pressed to cope with growth that it has recruited several staff men from a major industrial union.

Faced with this new potent factor in employee relations, communities have reacted in various ways, and in the opinion of some, overreacted oc-

casionally, too. A few have treated a union as a foreign invader, trespassing on sovereign soil, and learned to their dismay the wisdom of a former vice-president of the National Association of Manufacturers, Charles Kothe, who declared that unions are organized from the inside, not the outside.

Other communities have swung to the other extreme, hastening to recognize and agree to the broadest demands of the union. This is not to say that a city should stand like a stone wall in exacting unreasonable terms and conditions any more than a union should have free play in writing a first contract. Truth be known, most unions are eager to get an initial agreement signed and sealed to show their new members and accept, albeit reluctantly, economic and management provisions which, if offered years later, might be treated as an insult and an invitation to a duel.

Beyond the psychological impact of a sudden demand for union recognition, cities are handicapped by their lack of preparation for such a day. Union officials are usually primed for the execution of recognition agreements and the negotiation of labor contracts, but local government officials are rarely ready. A result, occasionally, is recognition of a bargaining unit and adoption of an agreement which represents more a straitjacket than a tailor-made document covering a fair and workable resolution of labor-management problems. Such provisions may be years in altering.

For example, some communities have granted recognition to tiny units of employees, and these fragmented bargaining operations have led to an endless series of negotiations—one union after another, each striving to show they can do better than the other—and have led occasionally to bickering between unions over work jurisdiction. This is not a distress limited to small communities. In New York City, 70 unions negotiate for 200 separate contracts. In Detroit, there are 146 bargaining units, covering 26,000 employees. Milwaukee even has a one-man unit to be bargained for.

Some practitioners have criticized units in which supervisors and rank-and-file employees are mixed because of the possibility that grievances may arise and supervisors may be embroiled in a conflict of interests or the remoter possibility that illegal strikes may arise and the local government require the efforts of supervisors to carry out essential municipal functions.

This is not to say that these things inevitably flow in the wake of employee choice of a union and employer recognition of a union, but unless public employers understand the collective bargaining process, such things can happen. They have to recognize that a contract proposal is only that and that negotiation is a two-way bridge, rather than a one-way street. Union representatives understandably will maneuver and attempt to make points. They will seek to obtain the best possible contract for their members that they can. Management representatives have their duty, too. They have to learn to parry and thrust in the bargaining room, too, and if they

enter unprepared, the union will not consider it necessary to reward ignorance with mercy. Unions cannot be expected to negotiate for both sides of the table. As we are fond of telling our children, there's no substitute for education.

Each has its role to carry out, but beneath the role-playing, cities and unions have much in common. Where employees have selected a union to represent them, both stand to gain by providing quality services in uninterrupted fashion. Poor service, interrupted service, will inevitably mean poor public support. Cities and unions have to treat each other with respect and understanding of each other's problems. Local governments have real financial problems complicated by statutory limitations, the budgeting and tax rate process, as well as competitive relationships with neighboring communities. Unions are made up of the city's employees, not distant strangers, and they have to live and raise families in a period of almost steadily rising prices at home and increasing complex job challenges at work. A city father has his constituency, including the municipal employees, to satisfy but the union leader has one, too. Both have to find ways to deal fairly with taxpayer and city employee alike. If either sets out to destroy the other, the relationship is doomed to crisis upon crisis.

Common sense is essential. I have heard of a city where employees were committed to a three-year contract and each year, like clockwork, the cost of living went up and wages lagged further and further behind. The employees asked the city to voluntarily agree to a reopening of the contract, but the answer was "no." At the end of the three-year period, the employees asked for a substantial raise and instead were offered two cents an hour. They took this as an insult and went out on strike. The city fathers took this for a day or two, then called in their negotiator and told him to find a basis for settlement—period. The final figure was an increase of 57 cents an hour and the negotiator confided that he could have settled for about a fifth this amount—and no work stoppage—if his bosses had recognized the realities of the situation and permitted a realistic offer at the outset.

Bargaining is a difficult, specialized, and yet imprecise profession. It demands hard, hard work. It requires training, understanding of people, and is helped by an ability to have a "feel" for a situation. It takes hours and hours of patience, hours and hours of preparation of first- and second-line positions, analysis of proposals, and the ramifications of each. There are no short-cuts, no miracle-makers to suggest. But the outcome is crucial to each community since personnel costs generally represent more than half of the local government's total budget. The end result has to be fair—anything less will court employee discontent and may even attract a rival union to the scene.

Experience has shown that negotiating table exchanges have sometimes provided some unexpected benefits—insight on poor management in some departments, awareness of inadequacies of an age-old civil service system, give-and-take discussion over changes under consideration, and overall an opportunity for both sides to air disgruntlement and clear the atmosphere for a clean start.

Public sector negotiations labor under an additional handicap—since strikes are prohibited, there is no strike deadline to spur bargaining along. There may be a budget adoption deadline or the end of a contract, but this is not quite the same. A public employer may think this gives him an absolute advantage at the bargaining table so that he does not have to bargain realistically. I would suggest that when an employer acts this way, he provides additional ammunition to those already advocating the right to strike for public employees. In a free democracy, employees will find, one way or another, a means to make honest protests effective.

A strike is a serious matter. It means loss of pay for an employee and a loss of services to the community. It runs the risk of an indignant citizenry and thus can turn against the union or the public employer, depending on how residents assess the fairness of demands and offers. In short, apart from the legal considerations, a strike involves problems for all concerned. It means that we all have a stake in continuing to search for better ways to resolve differences.

As a first, good-faith negotiating by both parties is essential. Negotiators have to be willing to explain and explore, to be open to discussion and persuasion, and to meet with the positive attitude of wanting to find agreement. And, almost without exception, this results in peaceful negotiation of differences. Each year, thousands and thousands of agreements are signed by both parties without any third-party intervention, and this is testimony to the soundness of the principle that when reasonable people talk out their problems, resolution is possible.

In the unhappy circumstance where, despite these good efforts, a bargaining impasse ensues, negotiators should have access to the healing efforts of a mediator or fact-finder. Several observers have indicated a need for additional training of these practitioners in the peculiar problems of municipal labor relations and finances. Obviously, if strikes are banned, we must provide effective means for resolving impasses.

To cite these dimensions of the municipal and county labor relations problems is to indicate the long-range objectives of our City-County Labor Management Relations Service. The sponsors of the service—National League of Cities, United State Conference of Mayors, and National Association of Counties—do so, not in the thought that the service will solve all such problems, but rather that it will bring together much of the re-

sources of information, education, and expertise already developed in the public sector. We shall be organizing a number of projects aimed at assisting public employers, public administrators, and public interest groups carry out their responsibilities to employees and to their communities.

Advice and suggestions will continue to be welcomed in preparing this program. I am reminded of the beggar who accosted a pedestrian and asked for a half-dollar for a shot of whiskey. The pedestrian replied that he wouldn't give him money for whiskey, at which the beggar drew himself up to his full height and announced, "Give me a dollar, give me a nickel, but don't tell me how to run my business." Well, I don't care whether you wrap your suggestions in a dollar or in a plain envelope; I assure you we will welcome your advice on how to run our business because our business is to help you in your business.

The National Dimension in Public Employee Bargaining

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Introduction

In the field of collective bargaining, the private sector has achieved a relatively high degree of stability; therefore, the predictability of private sector bargaining appears to be *well established* and *orderly*. While there are exceptions to this general rule, such exceptions have not significantly affected the already well-established principles nor have they seriously affected the significant contributions to the field of industrial relations.

Such is not the case in the public sector. Collective negotiations (collective bargaining is often so labeled in the public sector) is relatively new, being primarily a development of the past decade, and it is still in its formative stage. Consequently, there is much diversity and speculation as to the proper form and direction it should take.

My objective today is to give you a perspective on the national picture in the public sector. In that respect, the thoughts I plan to share with you will deal with broad aspects. Additionally, it will be impossible to cover everything; therefore, I've singled out some areas I feel are more important.

I plan to cover the employment profile of public employees, the degree and concentration of unionization in the public sector, the factors which may have played a significant role in influencing the growth of this phenomena, and some experiences in several states.

Employment in the Public Sector

Until recently, the public employment labor force statistics were brushed aside since manufacturing was considered more interesting and was thought to be the glamour and growth area of the economy. As manpower analysts began to take cognizance of the service aspects of the economy, there was a sudden awareness that employment in the government sector was developing faster than other areas and that, indeed, it was a major employer of America's manpower. In 1966, about 17 per cent of the labor force worked for some governmental agency and now the expectations are that nearly 20 per cent will be doing so by 1975. Most of these employees will work for local and state governmental groups with the federal govern-

mental groups employing only about 2.5 million out of a total of 15 million workers. Table I shows the figures of these developments.

Table I

Public Employment as a Percentage of Total
Nonagricultural Employment, 1966, and, Projected, 1975
(In Thousands)

	1966		Projected 1975	
	Actual Numbers	*Per Cent of Total Employment*	*Actual Numbers*	*Per Cent of Total Employment*
Total Nonagricultural Employment	63,982		76,030	
Total Public Employment	10,871	17	14,165	18.5
Federal Employment	2,564	4	2,765	3.6
State Government Employment	2,162	3.4	3,205	4.2
Local Government Employment	6,145	9.6	8,195	10.7

Source: U.S. Bureau of Labor Statistics, Tomorrow's Manpower Needs, Bulletin No. 1606, Vol. IV, Appendix B.

The reasons for the rapid advance of governmental employment are many, but among the most apparent are: (1) the strong service orientation of society; (2) the urbanization of our culture and the attendant needs resulting therefrom; and (3) the increasing emphasis on education.

Occupational shifts have also been very dramatic since the start of the past decade. The thrust already developed will probably continue in the future with white-collar groups leading the way. Professional and technical employees are expected to have achieved nearly a 75 per cent increase from 1960 to 1975. Among other occupational groups, only service workers and clerical employees reflect anywhere near such an increase.

Unionization Among Public Employees

Union membership in public employment in 1966 was about 2,790,000 with a little more than one million federal employees organized while approximately one and three-quarter million local and state employees belong to labor organizations. The percentage of federal employees in unions was a little more than 42 per cent, which is much higher than the national average for the private sector in nonagricultural employment (28 per cent) and significantly higher than state and local employment where the percentage is slightly over 15 per cent. The major reason for the high percentage of unionization in federal employment is the high concentration of unioni-

zation in the Post Office Department. These postal unions have been in existence for many years and, although they no doubt have been aided in their growth by the Executive Order, they have had a previously strong base. However, additional union growth in the federal sector has been aided by Executive Order 10988 and perhaps now Executive Order 11491.

The unions in public employment which have the largest membership follow.

Union	*Membership In 1968*
State, County and Municipal	364,468
Government Employees AFGE (Federal Government only)	294,725
Letter Carriers	210,000
Postal Clerks	166,000
Teachers	165,000
Firefighters	132,634

Source: U.S. Department of Labor, Bureau of Labor Statistics (Special Bulletin issued November 3, 1969).

It should be noted that the unions representing employees exclusively of the federal sector have grown tremendously in the last half decade, and such growth does not take into account the already large professional but militant organizations such as the National Education Association and the American Nurses Association.

For example, the Bureau of Labor Statistics reports in a November 3, 1969, special release that public employee union growth has been four times faster than the labor movement as a whole. There has been about a 25 per cent (24.7%) growth rate of public employee unions. The examples below emphasize these developments.

The AFGE increased from 199,800 to 294,200; or 47.4% from 1966 to 1968.

The AFT increased from 125,000 to 165,000; or 32.0% from 1966 to 1968.

The AFSCME increased from 281,277 to 364,486; or 29.6% from 1966 to 1968.

A report prepared by the International City Managers Association indicates that over 91 per cent of municipalities with a population of 10,000 or more have some kind of an employee organization.

From the above it may be in order to conclude that public employment will probably continue to grow in the next few years and such growth will almost entirely be at the state and local levels. Additionally, educational employment will comprise the major proportion of that growth. The national occupational shift from blue collar to white collar is indeed dramatic

and this development should hold true for public employment occupations also.

Labor unions have not experienced any pronounced overall growth in the last decade and any stability or increases in their relative standing to the total labor force has been the result of inroads made by public employee-oriented unions. Despite the increasing "professionalism" among public employees, unions have been able to attract a larger percentage of workers to their ranks. While their success at local and state levels does not appear to reflect the astounding developments at the federal level, there should be allowances for professional association which appear to be strongest among teachers and nurses. Furthermore, the federal union concentration is centered among postal unions, and if these long-established unions are discounted, union penetration at the federal level falls short of the rest of the public sector.

The unionization of public employees and the increasing employment levels are indeed significant factors influencing the growth of public employee bargaining. However, some of the other underlying reasons for these developments are also important to consider. The following are a partial listing of those factors, with a brief discussion of each.

Factors Influencing Public Unionization

Social and Economic Forces. Today's social values are differing from those embraced in the past. Most of the individuals who grew up and achieved the over-thirty status by the beginning or middle of the decade of the sixties were adherents to the protestant ethic. They respected existent structures, responded to authority and, more importantly, tended to be observers of society rather than participators. If they participated, it was only peripherally, and then only to advance the existing "establishments" rather than to assault them.

Today's youth seek involvement in society and intense participation at every level. Their involvement has often been in the form of challenging the existing structures. Of particular significance is the fact that these young people have been somewhat successful. For example, universities have begun to respond to young people's militant appeals and politicians, as well as the nation as a whole, have begun to critically examine many questions brought up by these young people. In regard to public bargaining, the enthusiasm and success of the youth movement has rubbed off on the public employee.

The public employee who now perceives himself, with some justification, as a deprived and underprivileged worker has collectivized and often adopted militant tactics. They have frequently been successful; consequent-

ly, each action and success story reinforces and promotes even more. A. H. Raskin articulates this development.[1]

Social behavior is often influenced by the economic circumstances. Prior to World War II, workers knew that jobs were scarce and hard to come by; and consequently, they respected the opportunity to work and find a "good and secure job." Public employment met the criteria of security and, moreover, a government job was good paying, prestigious, and laden with fringe benefits.

After World War II and the following inflationary developments, unions were successful in the private sector in fringe benefit bargaining as a result of the government's fiscal and monetary policies. The job market changed from one of poverty and insecurity to relative abundance. Young people sensed these changes and have grown up without the fear of economic and employment insecurity. This attitude and behavior is becoming more widespread. Additionally, public employees realize they are no more secure in the jobs than their counterparts in the private sector. To this development came the realization by public employees that they were being hurt by rising price levels. Consequently, unionization and collective bargaining offers an inviting alternative to the public employee.

Bigness and Depersonalization

Since public employment is becoming large and increasing at such a rapid pace, it is necessary for administrative and organizational structures of governmental bodies and agencies to become more specialized and bureaucratized. These developments, while often adding to organization efficiency, also contribute to the depersonalization of the individual. Job satisfaction often diminishes, supervisory and subordinate relationships are strained, turnover increases, and employee identification with the employing agency erodes. As a consequence, the workers often tend to find more satisfaction by joining a union as a channel of challenge to the organization.

Perhaps time will demonstrate to the employee that the growth of the union will bring on the same problems and frustrations that the growth of the employing agency produced, but that event is off somewhere in the future.

Spillover Effect and Legislation

In January, 1962, President Kennedy issued Executive Order 10988 which granted federal employees limited collective bargaining rights and opportunities. No doubt this directive assisted in the growth of unions in public employment. More importantly, it probably gave some impetus to state leg-

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[1] A. H. Raskin, "The Revolt of the Civil Servant," *Saturday Review* (December 7, 1968), p. 27ff.

islatures to enact legislation establishing collective bargaining for state and municipal employees. Now effective January 1, 1970, the Nixon administration has issued Executive Order 11491, which in many respects has emphasized collective bargaining in the federal sector to a greater degree.

State Experiences With Public Employee Bargaining

At the beginning of 1969, thirty states had laws endorsing in some degree the right of some or all state and local employees to bargain collectively. These laws were either mandatory—in that they demanded that bargaining must take place if the employee group was properly certified—or permissive, i.e., the employing agency could, if it so desired, engage in some kind of collective bargaining activity with an employee organization. In this latter category "meet and confer" statutes might also be added. Moreover, these state laws are far from uniform in that they often only cover one group of state employees. For example, in 1969 the American Bar Association reported state laws as follows:

Permissive Statutes—The Right to Present Proposals (4)

Alabama—firemen
California—firemen
Florida—state and local
Pennsylvania—state and local

Permissive—An Obligation to Meet and Confer (8)

Alaska—state and local
Delaware—municipal
Nebraska—teachers
New Hampshire—towns
North Dakota—cities
Ohio—public utilities
Oregon—state and local
Washington—public utilities and port districts

Mandatory Obligation Laws (24)

California—local
Connecticut—local
Delaware—local transit authorities, state and local
Florida—firemen
Georgia—Chatham County only
Hawaii—state and county
Louisiana—public transportation
Maine—firemen

Maryland–teachers
Massachusetts–state and local
Michigan–local
Minnesota–state and local
Missouri–state and local
New Jersey–state and local
New York–state and local
North Dakota–teachers
Oregon–teachers and nurses
Pennsylvania–transit authorities, police and firemen
Rhode Island–state and local
South Dakota–state and local
Vermont–state and municipal, except professionals
Washington–state and local
Wisconsin–state and local
Wyoming–firemen

Additionally, one should note that some of these state laws have been strongly influenced by organized labor and have a private sector labor relations orientation and others have adopted that of the professional associations such as the National Education Association (N.E.A.).

Despite the increasing numbers of laws passed, there has been an increase of problems in this area. The absence of legislation is chaotic and confusing but often the presence of legislation causes an initial flurry and increase in bargaining activity.

Transfer of Private Experience to Public Sector

On a national scale there seems to be a feeling that public sector bargaining can gain from the experience of the private sector. Below is an example of this thesis.

Grievance Procedure. The bulk of union members in government employment are in rank-and-file categories. The grievance procedures can therefore resemble the industrial concept, i.e., the use of the immediate foreman as the first step in the procedure. Requirements of training for stewards could also be a possible extension of the private experience as well as the training of foremen for the handling of day-to-day affairs with the union.

Summary

With America's population continuing to demand more services in society, and the rush to urban centers, there will no doubt be a continued growth in government employment. Today, more than half of the states have legislation which either promotes or allows collective bargaining for public employees. It is axiomatic that legislation (permissive or manda-

tory) will foster greater activity at least initially and the evidence bears this out.

While no real pattern is yet discernible, the courts have decided that generally public employees have the right to join labor unions. In the absence of specific legislation to the contrary, the courts have further held that while public employers are not required to bargain with unions, they cannot interfere with the constitutional right of association and often are morally bound to "meet and confer" with employee associations.

While private sector experiences are indeed helpful, they should not be transplanted in their entirety.

Most people who have examined public bargaining indicate that legislation is necessary to provide a framework for the orderly structuring of a bargaining relationship. While legislation often creates some confusion after its initial development and enactment, the experience indicates that long-run stability is a goal which can be achieved.

Iowa Public Employee Relations

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Collective negotiations for public employees in the states has moved in what seem to me to be three stages. *The first stage* in most states consists of a series of opening skirmishes by employee organizations for recognition and bargaining rights, frequently marked by threatened or actual public employee strikes. In this stage there are typically no clear legal guidelines defining the rights and obligations of the employees or employers and the court system is frequently under pressure to provide some semblance of order. In this stage we see considerable informal negotiation.

Stage two might be called the legislative stage where recognition takes hold that there is need for study and possible action on ground rules for public sector negotiations. Typically here the first step has been establishing a study commission to develop recommendations for consideration by the legislature. In most states, but not all, state legislation has followed with machinery established to administer a public sector negotiations law.

Stage three typically sees the parties initiate formal bargaining relationships consistent with state law concentrating, within the ground rules established, on the substantive economic and noneconomic negotiation issues. This stage is by no means the millenium but now the parties can proceed knowing that there are rules and machinery available to guide representation issues, control negotiations, and to assist with impasse resolution.

Where does Iowa stand now in this continuum? We have had our skirmishes, albeit fewer and less serious than many other states have experienced. We have had our forays into the courts for guidance; we have had strikes and considerable negotiation despite the absence of guidelines. We have moved into the legislative stage with a study commission, recommendations, and a bill now under consideration in the Legislature. Should the Legislature take action, we will move ahead toward stage three. Should it decline to act, we will revert to stage one and must look to what the courts have said regarding public sector negotiations.

In answer to the question of where Iowa stands now, I must say that we are at a most critical point. It would be well at this point to review what is

included in the bill, Senate File 1084, now under consideration in the Legislature.

Titled the "Public Employment Negotiations Act," this bill provides for collective bargaining in public employment and gives employees of the state, its political subdivisions, including school districts and other special-purpose districts, the rights to form and join organizations and to engage in collective bargaining with public employers. A Public Employment Relations Board would be established to assist in determining bargaining units, conduct representation elections, assist with mediation and fact finding, and act as an information center. The bill provides for impasse procedures negotiated by the parties or, in the event that the parties cannot agree on such procedures or do not use them, provides for mandatory impasse procedures including both mediation and fact finding.

The bill prohibits "strikes by public employees in critical services," defined as "any service which is necessary for the public health, safety, or welfare, including but not necessarily limited to services provided by policemen, firemen, security personnel at state institutions and peace officers." Strikes by other public employees are prohibited "unless all of the following conditions are met:

1. The impasse procedures established by the agreement of the parties or under the provision of this Act have been exhausted and a period of not less than ten days has expired following the completion of the last impasse procedure.

2. The strike is called by an employee organization certified or recognized as the exclusive bargaining representative of the majority of the public employees in an appropriate unit.

3. The strike is called in support of a bargaining demand within the scope of collective bargaining.

4. The strike is consistent with the public health, safety, and welfare."

The bill also provides for injunctions preventing or terminating strikes in violation of the bill.

This proposed legislation also outlines certain union and employer unfair labor practices that would be handled by civil action in the courts. Procedures are included for bargaining unit determination and the handling of elections by the Public Employment Relations Board.

The scope of collective bargaining required includes wages, salaries, and other economic benefits, hours or periods of service, and other conditions of employment, including grievance procedures, dues checkoff, and matters related to laws dealing with public employment. The duty to bargain in good faith is defined and exclusive representation is provided.

The Act would be effective for all employees covered, except state employees, on January 1, 1971. The latter would be included on July 1, 1971.

The Governor may delay the latter date for state workers if he feels that appropriate machinery is not available for collective bargaining, but such delay may not go beyond July 1, 1972.

Whether the bill or an amended version becomes law is pure conjecture at this point. For the public employer and employees the next relevant question is where does collective bargaining stand in the state if no legislation is passed? A bill such as Senate File 1084 answers many questions for the public employer and employee. The answers may not be exactly what one of the parties wished, but a bill of this type does offer guidelines by which the parties can resolve many of the problems of collective bargaining. Without legislation, the parties must look to recent court decisions for guidance. Here, the parties will find fewer and different answers.

The most recent statement of public policy in Iowa on public sector collective bargaining was made in a State Supreme Court decision on February 10, 1970, in a case involving the State Board of Regents and the United Packing House, Food and Allied Workers, Local 1258, the latter claiming to represent physical plant workers at the University of Northern Iowa. The central issue in this case was whether the Board of Regents, as an administrative agency of the state, has the power and authority to bargain collectively with the union. A lower court ruling had held that the Regents have the authority to bargain but may choose not to if they so wish.

The Supreme Court accepted the following propositions as the law of the case:

1. Public employees have the right to organize and join labor organizations.
2. Public employees do not have the right to strike.
3. The union has the right to picket for informational purposes if the picketing does not interfere with or impede the operation of the university.

The part of this decision that we are here concerned with is the authority of an administrative agency of the state to bargain collectively. The Supreme Court answer is that it depends on how you define "collective bargaining." The court holds that there is a vast difference between "implying authority in the Regents to meet with selected representatives of employees to discuss wages, working conditions and grievances on behalf of *those who have agreed to such representation* (emphasis supplied) and implying authority in the Regents to recognize the union as the *exclusive employee representative of collective bargaining on behalf of all employees* (emphasis again supplied). The court felt that the difference is crucial.

The court holds that the Regents have "the power and authority to *confer* and *consult* (emphasis supplied) with representatives of the employees in making its judgment on wages and working conditions." In this context the Regents have authority to bargain collectively. However, while the

court gives the Regents the option to "confer and consult" with employees representatives it feels it "cannot imply authority . . . to agree to exclusive representation, depriving other employees of the right to be represented by a group of their choosing or an individual the right to represent himself." The Regents, says the court, have the "power and authority to meet with representatives of an employee's union to discuss wages, working conditions and grievances if it so desires. It can do so without becoming obligated to meet with the representatives of any other group of employees" and "there is no compulsion to sign an agreement."

The court holds that to extend full collective bargaining rights to public employees similar to those in private industry is a legislative function. In addition, this court "sees no reason why the Regents, if they so desire, could not enter into one written contract with the union binding all members of the union agreeing to such representation as long as the terms of the contract are within the statutory authority of the board and contain no terms of employment which could not be included in a standardized contract for individual employees."

In essence, this opinion holds that the Regents:

1. Have the power and authority to meet with, confer and consult with representatives of employees in making decisions on wages, working conditions, and grievances.

2. Can effectuate these decisions through appropriate legislation or by contract with the union, binding only upon the union membership.

3. Have the option to exercise these powers and may choose not to exercise them.

In addition, the court states that the Board of Regents may not agree to exclusive representation and that it may deal with as many employee groups as it wishes or any one of them if it desires.

In this decision two of the justices concurred while taking exception to certain limitations imposed on the power of the Regents to bargain collectively. These limitations are related to the two issues mentioned above regarding exclusive representation and the choice of groups to be met with. The two justices argue that these were not issues in the case, that they should not have been decided, and that if a decision must be made on them they disagree with the conclusions.

These two justices hold that neither side argued the question of exclusive representation. But if the issue is to be decided they feel that public collective bargaining need not be "interpreted to prohibit exclusive bargaining with one recognized agency." The court, they argue, can tell an administrative agency what it can and cannot legally do, but it cannot attempt to tell the agency how to do it. These two justices also argue that if the agency can choose to bargain with one group and to exclude others this, in essence,

is exclusive bargaining. By this reasoning they feel "we are placing public agencies in an impossible position." The argument here is that without exclusive representation, the employer may be faced with a number of competing representatives and an inability to channel employee claims through a single representative.

In addition, these two justices object to the majority conclusion that exclusive representation implies collective bargaining "in an industrial sense." With no right to strike, with nonmandatory bargaining and the rights of the nonunion member protected, this is hardly industrial collective bargaining, they argue. Their conclusion is that the majority opinion, as written, "is likely to cause more public employee strife, rather than less" and that "It can only make the public administrators' personnel problems more complicated rather than less complicated."

I must confess that I agree and would add that the decision also complicates the employee representatives' problems. In the early days of private sector labor relations the first battleground was over the issue of recognition and representation. Not until the representation controversy was institutionalized through National Labor Relations Board election procedures did this issue "cool off." In the public sector we are, in Iowa, still at the point where the recognition issue is hotly contested. This court decision does not resolve that controversy and it likely will not be resolved until legislative guidelines are established with enforcement machinery.

From the employer point of view, how might he respond to this option to meet and confer? On what basis does he determine, if he wishes to negotiate, who represents his employees? In the face of competing unions, how does he resolve the dilemma? The present legal situation provides no guidelines except that you cannot recognize a representative as an exclusive bargaining agent. The likelihood of dealing with competing unions representing similar employees is a strong one.

Returning to the proposed bill now before the Legislature, how would the representation question be handled? A petition could be filed with the Public Employment Relations Board by an employee organization, a public employee, or the employer. If the union can show that it represents a majority, the Board can certify it as the bargaining agent unless the employer challenges, another union can show at least 10 per cent support by the membership, or the Board has reason to doubt majority status. The Board is empowered to hold hearings on the appropriate unit for bargaining. Criteria to be used in such determinations include: community of interest among employees, authority of the employer, the burden of excessive bargaining units, similarity of skills, efficiency of operations, etc.

Following unit determination, the board is empowered to hold a secret ballot election of employees. If any union on the ballot gains a majority of

the votes cast, it is certified as the exclusive bargaining representative of all employees in the unit. If none of the choices on the ballot receives a majority, a run-off election would be held between the two choices receiving the most votes. If a majority vote for no union, the board will not allow another petition for an election in that unit for at least one year. If a union wins the election, they gain certification for one year or for the length of any contract signed up to a maximum period of two years. The employer is required to bargain with a union certified by the board.

Conclusion

Thus, while the recent Iowa Supreme Court decision allows the public employer, in the case referred to, to meet and confer at its option and denies exclusive representation, the recently proposed bill in the Legislature sets up procedures for recognition of an exclusive bargaining agent and, once a bargaining agent is certified, requires mandatory good-faith bargaining. The bill makes fairly clear the rules of the game. This state now stands at that tantalizing point between the first stage of public sector bargaining, marked by opening skirmishes between employers and employees, and the end of the second stage culminating in legislative action. It remains to be seen how much longer we will remain at this point.

Negotiating the Public Sector Agreement*

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INTRODUCTION

Much has been written and said about the challenge presented to public employers today by requests that they sit down and negotiate with employee organizations. This challenge is both economic and substantive in nature. Public employers are not only being faced with economic demands that often exceed their financial resources but also, and more significantly in the long run, with demands that the union be allowed to codetermine policy decisions that traditionally have been determined exclusively by the public employer. This is especially true with respect to educational policies. For example, the National Education Associations *Guidelines for Professional Negotiations* provide that:

> A professional group has responsibilities beyond self-interest, including a responsibility for the general welfare of the school system. Teachers and other members of the professional staff have an interest in the conditions which attract and retain a superior teaching force in the in-service training programs, in class size, in the selection of textbooks, and in other matters which go far beyond those which would be included in a narrow definition of working conditions. *Negotiations should include all matters which affect the quality of the educational system.* (Emphasis added.)

Donald Wollett, General Counsel for the N.E.A., has bluntly stated that the "underlying motive [of teachers' organizations] is the quest for power" and that school boards "increasingly will be impelled . . . to share authority to determine educational policies."[1] Other public employee unions are making similar demands.

Formulating an effective response to these demands is no easy task.[2]

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**The author wishes to thank the Public Personnel Association for permission to repeat portions of an earlier article entitled "Drafting the Public Sector Labor Agreement" which appeared as an issue of the Public Employee Relations Library.

1 Wollett, "The Coming Revolution in Public School Management," speech given at the Cubberley Conference, Stanford University, Palo Alto, California, July, 1966.

2 That the task is more difficult than in the private sector is indicated by the following observation of Dr. Willard R. Lane, Chairman of the Division of Educational Administration at The University of Iowa:

> In the private sector the employer's right to design and control the kind and quality of a product he wishes has been left relatively unchallenged. In education, many of the demands frequently made in negotiations challenge these same professional prerogatives.

There is no absolute guide on how broad the scope of negotiations should be or on how to negotiate a collective bargaining agreement. And when you add to this the fact that collective bargaining is, by definition, a dynamic and fluid process which places a premium on flexibility, ingenuity, and patience, one can begin to appreciate the immensity of the challenge which presently confronts negotiations in the public sector.

Fortunately, experience is useful in searching for solutions. In discussing a public employer's response to union bargaining demands, I intend to draw not only on the increasing body of experience in the public sector but also on the vast experience developed by management negotiators in the private sector. Of course, some of the solutions developed in the private sector are not transferable to the public sector. Moreover, even a generally acceptable approach to a particular problem may not be suitable in certain circumstances. With these limitations in mind, I would like now to discuss the need for a basic framework within which to conduct negotiations.

THE NEED FOR A BASIC FRAMEWORK

Prior to negotiating any labor agreement, it is important that public sector negotiators have a firm philosophy to serve as a guide for the formulation of their proposals and for evaluating union proposals. In the private sector, management negotiators have generally relied on the management rights doctrine as the guiding philosophy. Briefly stated, the management rights doctrine can be defined as a rule of construction whereby management retains all those rights which it does not negotiate away. Integral to this doctrine is the concept that it is management's duty to act and it is the union's duty to challenge if the union feels that management's action is contrary to the negotiated agreement.

More importantly, this functional basis for management rights does not allow any room for the union to acquire rights to manage and slide in as a "joint manager" because unions are not functionally managers of the public authority. But, as previously noted, public employee unions are increasingly asserting the right to codetermine matters of public policy. These attempts must be resisted. Moreover, proposals that the public employer first obtain the union's agreement before acting in such areas as discipline, scheduling overtime, or subcontracting should be avoided. These "mutual agreement" or "veto" clauses are contrary to the management rights doctrine.

Managament Is the "Acting" Party

Since management's rights come from the duty of the public employer to

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Lane, "School Administration and Negotiations," *Collective Bargaining in the Iowa Public Sector,* Anthony V. Sinicropi and Thomas P. Gilroy (eds.) (Iowa City: Center for Labor and Management, The University of Iowa, 1969), pp. 38-39.

carry out its designated public policies and to operate efficiently, it is essential that the public employer be considered the "acting" party and the union the "passive" party insofar as the day-to-day relationships of the parties under a collective bargaining agreement are concerned. It is impossible for any public employer to be run properly if there are two "acting" parties.

The fallacy in any such view was very clearly expressed by William Leiserson, formerly a member of the National Labor Relations Board and the Railway Mediation Board, when he criticized the ill-fated attempt to have the Office of Production Management during World War II jointly directed by Management Representative Knudsen and the Union Representative Hillman. In his very pointed, yet analytical and sound criticism, he said:

> . . . President Roosevelt was asked what would happen if they disagree. He answered they would work together and make joint decisions. This was taken as an indication that the government intended the business of defense production to be a joint co-operative enterprise of employers and workers on an equal partnership basis. . . . There developed a confused organization and administration. . . . The arrangement had to be discarded. . . .
>
> In retrospect it is easy to see the mistake that was made in establishing the double-headed directorship of the Office of Production Management. It was due to inadequate analysis of the job that was to be done and failure to distinguish functions. We do not have to be versed in the philosophy of management to understand that it is not practical to mix the policy-making functions of an organization with the operating functions.
>
> It does not work and it satisfies no one. It leads to maneuvering and argument. It leads to maneuvering and argument about policy among operating officials whose sole duty should be to carry out promptly and efficiently the operating orders. . . . It turns a production organization into a debating society.

For exactly the same reason union leaders should not participate in day-to-day decision-making under a labor agreement.

The Union's Function Under A Collective Agreement

If union representatives should not participate in day-to-day decision-making, then what is their function under an agreement? Of course, during the negotiation of a collective bargaining agreement, union representatives must be recognized as having equal bargaining rights with management except as certain subjects are declared by law to be outside of the permissible scope of bargaining. However, once the agreement is executed, the union representatives' role as negotiators of contractual policy on an equal footing with the management representatives should cease and thereafter they should assume an entirely different role. That role should be the policing of

the agreement to determine whether actions taken by the public employer are contrary to the contractual commitments previously agreed upon by the parties. Thus, the union's function under the agreement can best be described as a "watch dog" function—watching the actions of the public employer, the "acting" party—to see whether such actions are in compliance with the agreement. It is readily apparent that a union cannot serve in a "watch dog" capacity if it assumes day-to-day operational responsibilities.

If being the "watch dog" is the union's proper function under the agreement, then the union must have the necessary rights to perform this function. In the private sector, these rights are contained in a properly conceived grievance and arbitration procedure. Approximately 95 per cent of the collective bargaining agreements in private industry contain such provisions. The legality of similar binding grievance and arbitration provisions in the public sector has been upheld in several recent decisions.[3] There is, however, considerable disagreement whether public employers should agree to binding grievance and arbitration provisions. On this point, I think it is entirely proper, assuming it is legal for them to do so, for public employers to agree to a binding grievance and arbitration procedure since it is logically consistent with the management rights approach. But I hasten to add that it should not be more. The procedure must be carefully drafted—for otherwise grievance handling and settlement procedures can become a means of eroding the public employer's rights during the term of the agreement. I will discuss this in greater detail later.

In addition to providing a basic framework within which to negotiate a collective agreement, the management rights doctrine provides a test by which to analyze union contract demands. Thus, to preserve the public employer's right to carry out its designated public functions and to efficiently manage its operations, one fundamental question should be asked as each union demand is placed on the bargaining table: Does the proposal prevent the public employer from taking actions necessary to implement the public policy goals entrusted to it by law in an efficient manner? If it does, the proposal should be resisted.

PREPARATION FOR NEGOTIATIONS

In collective bargaining, as in so many human endeavors, there is no substitute for thorough preparation. While the requisite preparations necessarily differ from situation to situation, certain basic preparations should be made prior to any negotiation.

First, an attempt should be made to anticipate the union's demands.

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[3] See, e.g., *Local 953, AFSCME* v. *School District of the City of Benton Harbor,* 66 LRRM 2419 (Mich. Cir. Ct., 1967); *City Employees* v. *City of Rhinelander,* 65 LRRM 2793 (Wis. Sup. Ct., 1967).

General information as to probable union demands can often be gleaned from the demands made by the same union in other areas, resolutions passed at union conventions, articles in the union's official publications, and speeches by union officials. Often, many of the demands involve problems or grievances peculiar to the individual public employer. Here, supervisory personnel are an invaluable source of information. They should be requested to list any employee grievances that have come to their attention. Negotiators in private industry have learned the hard way that they cannot ignore the so-called "local grievances" which seem to invariably arise in negotiations. Finally, a review of the last negotiations between the parties frequently reveals issues which are likely to reappear.

Second, each demand on which it is expected the union will push hard for should be analyzed from the standpoint of cost, i.e., how much would it cost if the public employer agreed to it,[4] and from the standpoint of its effect on the public employer's legal responsibility for establishing and carrying out operational policies. This same two-fold analysis should also be given when the union submits its formal demands.

Third, if there is an existing agreement betweent he parties, an attempt should be made to identify any clauses or rules items in the agreement that: (1) adversely affect efficiency, (2) unduly restrict the right of the public employer to act, (3) are costly, (4) result in excessive grievances, or (5) are vague or ambiguous. If any such clauses are uncovered, then proposals to correct the situation should be drafted.

Fourth, it is imperative that cost data be gathered, including information on recent settlements by the union, both in similarly situated cities and in nearby cities regardless of size or revenue resources. Moreover, the wealth of statistical data published by the Bureau of Labor Statistics and various trade associations should be readily available. Many state leagues of municipalities and state associations of school boards serve as a resource center for pertinent collective bargaining data. Internal cost data should include such items as the current wage and fringe benefit levels and their costs, the number of employees at each step and level of the salary schdule, a breakdown of the number of employees by sex, marital status, number of dependents, and age. This data must be available in order to cost out union economic demands, especially in the fringe benefit area.

Fifth, the budget and revenue projections for the fiscal year(s) to be covered by any resulting agreement should be ascertained. Projections should also be made as to what wage and fringe benefit levels the public employer will have to pay in order to remain competitive in bidding for employees to fill new positions or anticipated vacancies.

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4 See David and Sheifer, "Estimating Costs of Collective Bargaining Settlements," *Monthly Labor Review,* Vol. 92, pp. 16-26, May, 1969.

In gathering this data, it is often helpful to prepare charts and graphs to visually highlight points that the public employer's negotiators will want to make during negotiations. Such charts may be useful in trying to impress up union negotiators the fiscal and budgetary limitations of the public employer but the value of such statistical presentations should not be overemphasized. The authors of a recent study of negotiations in private industry noted that most management and union negotiators "tend to think of [such] presentations as window dressing, and that they have no important impact on the character of the settlements."[5]

Once these advance preparations are made, the public employer should then have enough information to begin to formulate its position on expected union demands and to develop its own collective bargaining objectives. No attempt should be made, however, to formulate a position on each union demand. The duty of the elected or appointed body that makes the final decision on whether to accept any agreement that is negotiated should be to establish fairly broad policy guidelines for its negotiating team, preferably after listening to and obtaining the advice of the members of the public employer's negotiating team and others who are knowledgeable with respect to public sector negotiations. Since there is a lot of give-and-take in collective negotiations, it would be unwise to unduly limit the authority of the negotiating team. Of course, the negotiating team would not have the final authority to make binding commitments inasmuch as the legislative body of the public employer or its equivalent must approve any agreement before it is legally binding on the public employer. For obvious reasons, the number of times that a public employer exercises its prerogative and refuses to accept a commitment made by its bargaining team should be kept to an absolute minimum.

COMPOSITION OF PUBLIC EMPLOYERS' NEGOTIATING TEAM

A public employer has the right to determine the composition of its negotiating team. Frequently, however, public employee unions attempt to dictate who is on the negotiating team. Thus, public employee unions from time to time have insisted that the ultimate repository authority—whether it be the mayor and council, the trustees of a park district, or the school board—directly participate in negotiations. Such attempts to dictate who sits on the management side of the bargaining table should be resisted.

In the first place, both parties have the right to decide the composition of their respective negotiating teams. In the private sector, it is an unfair labor practice for a union to interfere with the right of an employer to

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5 Ryder, Rehmus, and Cohen, *Management Preparation for Collective Bargaining* 61 (Dow Jones-Irwin, Inc., 1966).

designate its representatives for the purpose of collective bargaining. Thus, Section 8(b) (1) (B) of the National Labor Relations Act provides that:

> It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

The National Labor Relations Board has held that the purpose of this provision is "to safeguard the right of employers freely to designate representatives of their own choosing for the purposes, *inter alia,* of collective bargaining." *Local 294 International Brotherhood of Teamsters,* 126 NLRB 1, 4 (1960). Public employers have the same legal right to freely designate their collective bargaining representatives for the purposes of collective bargaining.

Wholly apart from the legal right of a public employer to determine the composition of its negotiating team are the practical considerations which make it unwise for the final decision-maker to directly participate in negotiations. As Charles C. Mulcahy stated in an article in the *Marquette Law Review*:

> The problems arising from delegation of bargaining to staff personnel are far outweighed by greater proficiency, objectivity and continuity. Elected officials are rarely trained in personnel matters. They are subject to numerous pressures which make rendering impartial decisions extremely difficult. Further, elected officials offer no guarantee of continuity for future bargaining sessions. Many municipalities therefore have delegated the negotiating function, within certain guidelines, to a skilled staff of legal and personnel experts.[6]

Slichter, Healy, and Livernash in their Brookings Institution study of collective bargaining in the private sector echo this conclusion:

> [Negotiations by operating officers] has the great disadvantage that operating men can ill afford to take time from their jobs to engage in bargaining, and they are not necessarily capable bargainers. *Nothing is more likely to produce bad bargains for employers than impatience on the part of management representatives to get back to their regluar jobs.* A labor relations staff is selected partly to obtain individuals skilled in the art of negotiations.[7] (Emphasis added.)

For similar reasons, the elected officials who have the final say on whether the agreement is ratified should not directly participate in negotiations.

Who, then, should be on a public employer's negotiating team? While

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[6] Mulcahy, "A Municipality's Rights and Responsibilities Under the Wisconsin Municipal Labor Law," 49 *Marq. L. Rev.* 512, 515 (1965-66).

[7] Slichter, Healy, and Livernash, *The Impact of Collective Bargaining on Management* 923 (1960).

this determination necessarily varies from situation to situation, a few guidelines may be laid down. The negotiating team should be selected on the basis of what each individual will be able to contribute to the process of negotiating a collective bargaining agreement. It should generally include at least one individual who is familiar with the personnel policies of the public employer and one individual who is familiar with the day-to-day operations and who can judge the impact of any agreement on such operations. Frequently, it is advisable to have an attorney who is versed in labor relations law either sit in on negotiations or available for consultation and drafting work when needed. Slichter, Healy, and Livernash noted that "the addition of a representative from the legal department is important because with the growth of arbitration, management (as well as the union) wants to be sure that the language finally adopted means precisely what it is intended to mean."[8] At least one individual on the negotiating team should have some first-hand experience in negotiating a collective bargaining agreement.

Robert Bendiner, in his recent book entitled *The Politics of Schools*, underscored the need for expertise in public sector bargaining:

> Unlike those labor-relations men hired by private enterprise to do their collective bargaining, the hapless members of a school board are by no means free to sit at the bargaining table all hours of the day and night. Engaged full time in earning a living or raising their families, they cannot devote themselves exclusively to negotiations until fatigue sets in or a settlement is reached. Neither can a board use public funds to match those available to private corporations or, for that matter, to the teachers themselves, for publicity and demonstration purposes. And, worst of all, rarely has experience equipped a board's members for the subtleties and 'gamesmanship' of collective bargaining. Unfamiliar with the jargon and stratagems of the game, they often misread the signs of their opponents, mistaking a 'maybe' for a 'no' and a 'no' for a 'never.' It is a field, says Dr. Wesley Wildman of the University of Chicago, in which 'the curse of amateurism is rampant.'[9]

Where the public employer does not have the expertise to negotiate a collective bargaining agreement, it is frequently necessary to turn to outside help. As Bendiner noted, "Boards are coming to understand that bargaining is not necessarily their forte and are accordingly relying more and more on hired negotiators, whose skills match those of the teachers' hired professionals."[10] This phenomenon is true with all categories of public employers. In this regard, Slichter, Healy, and Livernash observed that "there are today

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[8] *Id.*, pp. 924-25.
[9] Bendiner, *The Politics of Schools* 98 (1969).
[10] *Id.*, p. 99.

a considerable number of law firms and labor consultants well qualified either to advise employers during negotiations or to take on the responsibility of negotiating for them."[11]

Eventually, public employers who regularly negotiate with public employee unions will have to develop a counterpart to the industrial relations function in the private sector and hire individuals specifically for the purpose of negotiating and administering collective bargaining agreements. This will be particularly true with respect to public employers who have to deal with numerous unions.

PROPOSALS AND COUNTERPROPOSALS— THE IMPORTANCE OF TIMING

Some observers initially assumed that negotiations with teachers and other categories of public employees would be more sophisticated and mature and that public employers would not have to engage in the normal haggling that customarily occurs in negotiations in private industry. Public sector negotiators soon learned, however, that a completely frank and candid approach to collective negotiations was not always successful. There are perhaps two reasons for this. First, public employee unions are political organizations and to justify their existence they have to prove that they won the increased wages and fringe benefits. If a public employer agrees too easily, the union is precluded from taking credit, and, even worse, it may be accused of not asking for enough. As Martin Wagner of the Institute of Labor Industrial Relations at the University of Illinois observed:

> The easy granting of concessions by management to demonstrate a spirit of cooperation to aggressive union representatives at the negotiating level in the hope that by doing so their militancy would subside or that reciprocal concessions would be forthcoming often results only in an intensification of the aggressiveness.[12]

Second, many of the professional union representatives and their attorneys have had considerable experience and exposure to the negotiating practices in private industry. Not surprisingly, these individuals expect public sector negotiations to conform to what they have experienced in private industry, i.e., they expect negotiations to be a somewhat drawn-out process in which neither party offers at the outset what it is willing to finally settle for. While I am sure that this approach is unpalatable to some of you, I can assure you that many experienced negotiators have learned the hard way

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11 Slichter, Healy, and Livernash, *op. cit.*, p. 924.

12 Wagner, "What Public Management Can Learn From the Private Sector," speech delivered in Chicago, Illinois, June 24, 1967, at a seminar on "The Art and Techniques of Collective Bargaining," sponsored by the Public Personnel Association.

that the public employer's best offer should not, as a general rule, be included in its initial response to the union's demands.

Timing is also important in agreeing to union proposals on which you have no serious objections. Consider, for example, a union's proposal that the public employer check off union dues for all employees who sign voluntary check-off authorizations. In many instances, such a provision is completely acceptable to public employers. Some, however, have made the mistake of agreeing to it at the outset of negotiations. Generally, check-off clauses are given high priority by unions. Thus, unions are often willing to agree to certain of the public employer's proposals in return for agreement on a check-off provision. If you are willing to agree to a union security provision, make sure that the union pays a high price for it.

There are three other general rules which should be followed if at all possible. First, don't make any significant concessions in the final rounds unless the offer is contingent upon the reaching of a complete agreement. Second, don't discuss economic or cost items until most of the noneconomic items are resolved. Since some 80 per cent of the impasse situations in the public sector involve cost items, agreement on cost items generally means agreement on the entire contract.[13] Third, try to obtain the initiative by focusing negotiations on the public employer's proposals rather than on the union's. The use of counterproposals can be quite effective in this regard. By incorporating part of the union's proposals in its counterproposals, public employers can often keep the major emphasis on their proposals and counterproposals.

PROVISIONS WHICH PUBLIC EMPLOYERS SHOULD TRY TO OBTAIN

Collective bargaining is a two-way street. Thus, the public employer, as well as the union, can and should make proposals with respect to what it thinks should be included in the written agreement. Public sector negotiators must realize that it is their duty to represent the public employer's viewpoint with strength and vigor and not blindly accept union solutions in order to "cooperate" or get along with the union.[14] Accordingly, it is in-

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[13] In some situations, however, the public employer may have to make an economic proposal in order to "wash out" certain unresolved noneconomic items.

[14] See Heimbach, "Panel Discussion: Is Private Sector Industrial Relations the Objective in the Federal Service?," in *Collective Bargaining in the Public Service* 30, 31 (Industrial Relations Research Association, 1966):

> Too often I fear, Federal managers have taken the attitude that 'cooperate' means they should try to give the unions as much of what they ask for as they can. On the other hand, the unions too often have thought 'cooperation' meant that they were entitled to get much of what they asked for. In my judgment, this kind of an approach can only lead to trouble.

cumbent on public sector negotiators to initiate their own proposals as well as respond to those made by the union. In this regard, there are several items which they should attempt to secure.

1. *Management Rights Clause*

High priority should be given to obtaining a strong management rights clause. Such a clause usually begins with a provision to this effect:

> It is understood and agreed that the city retains the right to operate the city and that all management rights repose in it, but that such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following. . . .

After such a preamble, the basic management rights should be listed. Some of the basic management rights include the right to:

1. hire, assign, or transfer employees;
2. determine the mission of agency;
3. determine the methods, means, and number of personnel;
4. introduce new or improved methods or facilities;
5. change existing methods or facilities;
6. establish and require observance of reasonable rules and regulations;
7. discipline and discharge for just cause;
8. contract-out for goods or services.

Undoubtedly, the union will oppose any attempt to obtain a strong clause, but this should not deter you from attempting to negotiate as strong a clause as possible.

2. *Carefully Drafted Grievance Procedure*

As I mentioned earlier, the management rights doctrine contemplates the existence of a properly conceived grievance and arbitration procedure.

First, the agreement must by careful definition limit a grievance to a claim that the public employer has not complied with some provision of the collective agreement. In spite of the simplicity of this idea, many agreements provide that any complaint of any kind can be considered a "grievance" and allow such complaint to proceed up through the grievance procedure and, in many cases, if unresolved, to final and binding determination by an arbitrator. Such a procedure is an invitation to erode management rights. Grievances can then be complaints against management action per se and not merely a claim that the action taken by the public employer was inconsistent with a provision of a previously agreed-upon contractual policy, and the arbitrator will have the power to direct the public employer to change its action. This would lead to the loss or weakening of management rights.

In addition to carefully defining the term "grievance," a contractual limi-

tation on the time for filing a grievance (after the event which gives rise to the grievance) should be specifically set forth. This is especially necessary with respect to grievances involving wages and discipline in order to toll any back pay liability. Time limits should also be established for each of the various grievance steps. Generally, such provisions provide that the union must appeal the grievance to the next step within the contractual time limit or the public employer's last answer is deemed acceptable to the union.

The purpose of establishing time limitations at the various stages of the grievance and arbitration procedure is to facilitate the expeditious disposition of grievances rather than allowing them to "hang-fire" for long periods of time. Moreover, it prevents the union from bunching a large number of grievances between the last step and arbitration. Unions occasionally do this for two reasons: either to get a "trading" situation established with the employer during contract negotiations because of the awesome number of grievances appealed to arbitration or to get a large number before the same arbitrator in hopes that he will make a "split" decision.

In establishing arbitration as the culminating step of the grievance procedure, care must be exercised in limiting the authority of the arbitrator. Thus, the agreement should provide that the arbitrator shall have no right to amend, modify, nullify, ignore, or add to the provisions of the agreement. His authority should also be limited to the extent that he should only consider and decide the particular issue or issues presented to him in writing by the public employer and the union, and that his decision should be based solely upon his interpretation of the meaning or application of the "express language" of the agreement.

In the public sector, consideration should be given to whether certain subjects should be specifically excluded from arbitration. The 1966 City of Milwaukee-AFSCME Agreement is instructive. In addition to setting forth six specific exceptions, it provides that:

> [D]isputes or differences regarding classifications of positions; promotions of employees; pensions; and elimination of positions, except as provided in the contracting and subcontracting provision; are expressly not subject to arbitration of any kind notwithstanding any other provision herein contained.

The purpose of such exclusions are, in general, to preclude an arbitrator from ruling on matters which are deemed to be part of management's rightful prerogatives or on matters which are governed by statute or ordinance.

Finally, a procedure for choosing the arbitrator should be set forth. A desirable method is to provide that the parties attempt to agree upon an arbitrator within a specific period of time and, if such agreement cannot be reached, that the parties should then jointly request the federal Mediation and Conciliation Service or the American Arbitration Association to submit

a panel of arbitrators from which the parties can choose. In choosing an arbitrator from such a panel, it should be provided that the party requesting arbitration shall strike the first name from the list and the other party shall then strike one name, and thereafter the parties shall strike alternately, and the person whose name remains will be the arbitrator.

3. *No-Strike Clause*

Strikes by public employees have been uniformly held to be illegal. Nevertheless, public employers should insist that the agreement contain a complete no-strike clause, including the sanctions available to the public employer in the event the clause is breached. The reasons are twofold. First, it buttresses the argument that a strike during the term of an agreement is illegal. Second, it forewarns employees what they can expect if they engage in a walkout during the term of an agreement. Moreover, it constitutes a voluntarily agreed-upon contractual commitment by the union that it will not engage in a strike or slowdown during the term of the agreement. Most unions consider such a contractual commitment much more binding than the dictates of a statutory or judicial prohibition of strikes in that they voluntarily agreed to be bound by the former but not by the latter.

Such a clause should state that the public employer and the union agree that the grievance and arbitration procedures of the agreement are the sole and exclusive means of resolving all grievances under the terms of the agreement. For legal and practical reasons, the agreement should prohibit the union or employees from appealing to the mayor or anyone else for mediation or persuasion to resolve grievances. The conduct which constitutes a violation of the no-strike clause should be broadly defined so that there is no question but that mass resignations, mass sick leaves, etc., are in violation of the no-strike clause. It should further provide that in the event any employee violates the terms of the no-strike clause, the Board shall have the right to discharge or otherwise discipline such employee.

4. *Complete Agreement and Waiver of Bargaining Clause*

Public employers should attempt to obtain a waiver and entire agreement clause which states that the agreement is the entire agreement of the parties, terminating all prior agreements and practices, and concludes all collective bargaining during the term of the agreement. It should also state that the union specifically waives the right to bargain with respect to any subject or material, whether or not referred to or covered in the agreement, and even though it may not have been in the knowledge or contemplation of the parties at the time the agreement was negotiated. Such a clause is particularly desirable from the standpoint of the public employer. Once collective negotiations have resulted in an agreement, the public employer

should be able to assume with confidence that its bargaining obligations have been fulfilled and that it will not incur any new contractual obligations, monetary or otherwise, for the term of the agreement.

CONCLUSION

The task of negotiating and drafting collective agreements in the public sector is unquestionably difficult and challenging. However, the task can be made considerably easier if management negotiators understand the role of the public employer and the role of unions during negotiations and also during the term of the agreement.

Moreover, the history of collective bargaining in the private sector during the past thirty years should be studied carefully. Management negotiators in the private sector have learned by trial and error how important it is to carefully prepare for and draft labor agreements. In this regard, arbitration awards are a rich source of information. They reveal the importance of a sound philosophy for the negotiation and administration of the contract as well as pointing out the practical dos and don'ts for the practitioner.

The outcome of any negotiations, however, depends upon many factors which necessarily vary from city to city, but the chances of negotiating sound collective bargaining agreements are substantially increased if the negotiators for the public employer understand and vigorously defend the right of the public employer to carry out its designated functions in an efficient and orderly manner.

Negotiation Issues in Public Education

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I have been asked to speak on current issues and problems in negotiations in public education. It is a tall order, but I will do what I can with it. Since some of the unresolved matters in this area have equal importance for all categories of public employees, I do not propose to pay much attention to them. Certainly such questions as the right to strike, appropriate procedure for resolving negotiating impasses, the appropriate bargaining unit, and union or organizational security hold as much intrigue for sanitation workers as for teachers.

What I would like to do instead is deal with just two issues which, while not unique to the employment arrangement in education, have a rather special meaning for teachers, administrators, and board members. As you will see, the two main issues are related.

The first of these is the question of the impact of collective negotiations on judicious allocation of educational resources. Ironically, the initial concern here has not been that negotiations may be causing school districts to spend their money in the wrong places. Rather, the current public interest in resource allocation has been engendered by such studies as the Coleman Report which have attempted to cope with the problem of inequality of educational opportunity. Only recently, when a rather critical fiscal squeeze developed in public education did we begin to ask questions about the relationship of *negotiations* to resource allocation. Be that as it may, some of the studies dealing with educational opportunity have reported that schools with more experienced teachers and better student-staff ratios and higher average teachers' salaries do not do any better by their students than those much less favorably endowed. And since these are some of the issues that teachers are pushing for at the bargaining table these days, many observers began to wonder if children really do need what teachers want. In other words, the question is now being raised: what impact is negotiations having on the allocation of scarce resources? And, as a corollary, what effect are these changes (if indeed there are any and if they can be measured) having on the development of an efficient and effective educational program?

Now negotiations have not caused many new things to happen—the old things are just a bit more troublesome. Let me illustrate what I mean by pointing to just two items that show up at virtually every negotiating ses-

sion between teachers and school officials—the salary schedule and class size.

By salaries I do not mean the amount of money offered, although that certainly can have an influence on how much money is available to spend on other aspects of the educational program. What I do mean is the method of teacher compensation—the uniform salary schedule. Under this system, as you know, teachers are paid on the basis of experience and training. There is no distinction made between kindergarten teachers and physics teachers, no attention paid to the forces at work in the educational labor market, no consideration of individual skills or individual contributions to the enterprise.

To be sure, the uniform salary schedule is not a product of the bargaining table. But there is a certain amount of irony in the fact that at the very time we are beginning to develop a more rational basis for teacher compensation, we are also developing a system of educational decision-making, called collective negotiations, which is making it extremely difficult to make any changes in the old, and in my judgment, not very rational, method of payment. It is almost impossible to square the concept of "equal pay for equal work" with a flexible salary arrangement, a salary arrangement that would accommodate to surpluses and shortages in the teacher labor market, to the wide range in economic motivations and career commitment among teachers, in teacher skills, in responsibilities. So much for salaries.

Class size is an even more difficult kettle of fish. Probably it can be demonstrated that, on balance, teacher organizations are correct when they insist on smaller class size. Not only are working conditions improved (and that can have a significant impact on the recruitment and retention of teachers), but there is some evidence that conditions of learning are improved as well. The point is, however, that there is no evidence that *uniformly* small classes enhance student achievement. I would remind you that it is uniformity of treatment that characterizes collective bargaining. A class of twenty-five might be the optimum size for kindergarten but too small for a bright social studies class and too large for a class of slow learners in English. And if this is the case, it may be that this is too subtle and complex an issue to be resolved satisfactorily at the bargaining table. One can applaud the efforts of teachers organizations to have the number of students reduced, but at the same time one might question whether the sometimes abrasive atmosphere of a collective bargaining session is the appropriate setting for resolving this issue. At least as far as the details are concerned. I see nothing wrong with a contract provision that would allow for a considerable amount of teacher input in a committee selected to work out the details of faculty staffing, however.

The second issue that has somewhat special interest for the parties in teacher negotiations is the question of the appropriate subject matter of negotiations. What items belong in the collective agreement and what items ought to be excluded? Put still another way, what issues ought to be mandated, permitted, or prohibited? Experience in the private sector offers us the following guidance:

Mandate Issues. Bargainable issues that have been established by statute, the courts, and/or the appropriate administrative agency. Wages and hours have been established by law, such items as contracting out, profit-sharing schemes, and merit ratings have been ruled appropriate by the courts and administrative agencies. If either party invoked a strike or lockout over a mandated issue, such action would not be judged an unfair labor practice.

Permitted Issues. Everything that is neither mandated nor prohibited. Although there has not been much litigation in this area since the Borg-Warner decision in 1958, the presumption is now that virtually everything the parties have an interest in is negotiable.

Prohibited Issues. Such issues as the closed shop and hot cargo agreements that have been excluded by statute. Under the Taylor Law union security is prohibited. Other public employment statutes have attempted to limit subject matter (Delaware) and of course, some subject issues are either pre-empted or severely restricted by education or civil service law.

There has been considerable concern in recent months about the scope of teacher negotiations. Bills proposed in New York and New Jersey are designed to limit bargaining subject matter in public education.

Now for arguments usually advanced for restriction of the subject matter to the more basic and generally understood conditions of work such as salaries, fringes, and hours of work. Let me emphasize here that just because an issue is judged negotiable does not mean there must be a concession.

1. Many items do not lend themselves to resolution at the bargaining table. Such items as class size, curriculum, student discipline, and teacher evaluation are frequently cited as examples of the types of issues that should be resolved in an atmosphere less frenetic than a bargaining session.

2. The bargainers don't always have the ability to arrive at workable solutions to complex problems. It is often the politicized rather than the professionalized teachers who do the bargaining.

3. The lack of accountability on the part of teachers. Boards and administrators can be held accountable to the public in a rather meaningful way. Tenured teachers are relatively safe from public wrath.

4. Some negotiated provisions do not lend themselves to enforcibility. Arbitrators don't usually have the skill to rule on the alleged violation of a policy issue.

5. In many instances the school board is exposed to triple jeopardy when

it refuses to make a concession on a teacher demand. It forces the possibility of a hostile reaction when it says no at the bargaining table. It exposes itself again to the same reaction during mediation. If the issue goes to fact finding, and the fact finder finds for the teachers, it must then live with the publicized "fact" that it was in error, even though the board is entirely persuaded that its position is in the best interest of the public.

I won't make an attempt to meet these arguments head on. There is merit in all of them. But here are some of the arguments for placing no restrictions on the subject matter of negotiations between teacher organizations and school boards:

1. Employers are not compelled to make concessions on any of the demands brought before them.
2. The subject matter is in many cases self-regulating. As a general rule, teacher organizations can pursue with vigor only those issues that have wide support among the rank-and-file. The common thread running through the aspirations of most teachers is an interest in higher salaries and improved working conditions. They are generally not of one mind when it comes to such issues as student discipline, curriculum, or even staff-student ratios.

You pays your money and you takes your choice. My view on the appropriate subject matter of teacher negotiations is that

> to the extent that state laws do not pre-empt certain negotiable issues . . . almost all matters of sufficient concern to the teachers to warrant their arising during negotiations should be discussed at the bargaining table. This does not mean that school boards should relinquish the power of unilateral determination as to all such subjects broached by the teachers; it means rather that they should not adopt a 'management rights' stance which precludes discussion, but should instead 'demand' (i.e., bargain hard) for a retention of unilateral control over matters which, in their judgment, merit such. This approach by school boards would achieve four desirable ends. (1) It would preclude the bitterness and strife resulting from refusal even to discuss an issue on its merits. (2) It would require the board representatives to attempt to justify on a basis of reason their desire for maintaining unilateral control over the particular matter, thus rendering less tenable a position of 'power for the sake of power.' (3) It would expose the board to the potential enlightenment resulting from a full hearing of the teachers' views. (4) It would, reciprocally, expose the teachers to the potential enlightenment resulting from a full hearing of the board's views.
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> From an objective standpoint, it is difficult to see anything bad in the foregoing. School boards and administrators would, of course, lose the comfort of being able to take a position for no reason or for reasons they would prefer not to disclose. Teachers, on the other hand, would gain the satisfaction of joint exploration of subjects not specifically closed to discussion by state law. This gain by the teachers at the expense of the unilateral power

of boards and administrators is, after all, what collective bargaining is all about.[1]

Conclusion

In the light of what has already been said, I am impressed by two recent events in New York State, events that may or may not have been duplicated in other states.

1. The current budget calls for a decrease in the percentage of the total budget going for public education. Other matters are gaining higher priorities. Pollution, police protection, drug problems, mass transit, are examples of social issues that are forcing public education to take a back seat.
2. In 1969 there was a record number of budget defeats at the local level. In 137 out of 650 districts where budget approval is voted by the public, the voters rejected the proposed budget one or more times.

What this means to me is that the squeeze is on in the schools, both from the state and the local level. It also means that school officials will have to devote more attention than they seem to have in the past to the relationship between school costs and educational effectiveness. It means, too, that if bargaining is to cause a great many policy issues to be arrived at bilaterally, both parties to the bargain will, for somewhat different reasons, have to begin to look at the implications of these policies.

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[1] Robert E. Doherty and Walter E. Oberer, *Teachers, School Boards, and Collective Bargaining: A Changing of the Guard* (Ithaca, N.Y.: N.Y.S. School of Industrial and Labor Relations, Cornell University), Paperback No. 2, p. 92.

The Role of the Superintendent of Schools in Collective Bargaining

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The burden of my remarks this afternoon rests on the indecently simple premise that the collective action of little old ladies in tennis shoes is altering the social, political, and emotional climate within which schools operate, and the superintendent has an identity crisis. Easily the most crucial question before today's board of education is whether or not its superintendent can grasp the essence of teacher militance and collective bargaining and if he can respond in a way that he remains a central figure in the district's decision-making process. Failure to answer these questions affirmatively may well be a forerunner to the decline of local and lay control of public education in your community.

Teacher militance has not come unannounced. It is the product of a long and determined struggle for economic justice for public employees. Looking back, we note that each decade since the 1930s has seen the enactment of at least one major law dealing with labor relations. The Wagner Act of 1935, the Taft-Hartley Act of 1947, the Landrum-Griffin Act of 1959—all excluded government employees. The 1960s have earned the right to go down in labor relations history as the decade of the public employee. Across the country policemen, firemen, teachers, and garbage collectors are organizing, bargaining, submitting grievances, striking, and for the most part acting like their counterparts in the private sector. Of equal significance, legislators are passing laws which accord public employees rights won by workers in the private sector thirty years ago.

Those boards and administrators thinking only in terms of teacher negotiations are headed for some very unpleasant surprises. In states with hard-nosed public employee relations laws, the schools are being administered through the constraints of five separate master agreements covering custodians, secretaries, bus drivers, cafeteria workers, and teachers.

There are worse things that can happen to education than a law compelling "good-faith" bargaining. If conflict exists between employee and employer (and it usually does), then the bargaining process offers a reasonably authentic way to resolve it. Don't delude yourself about the presence of conflict in your district. It's there! In every district someone supervises and someone is supervised. In that relationship resides the potential for conflict. The teacher is not a free agent. He works within the framework of institu-

tional laws. And he now is telling us that he must have a voice in shaping those laws or he is going to raise hell until he gets it.

It is well that we not deceive ourselves about the issues being raised by teachers. They are not what they appear to be on the surface. The real issues are not wages, hours, and conditions of employment. Very few boards or administrators will deny the need for vast improvement in all of these areas. The bedrock issues are concerned with bilateral policy determination between boards and teachers organizations. They are concerned with the dilution of the delegated authority of the administrative staff. They are concerned with the extent to which a board can give away its ability to respond to the wishes of the community. They are concerned with the weakening or elimination of local and lay responsibility for education.

For superintendents the matter quickly reduces itself to the stark reality that the decision-making centers and process are no longer under their exclusive control. Much of the formal authority traditionally reserved for our status position is in this realignment process passing to officers of the teachers' associations. Before we know it, our management prerogatives narrow to those which have not been surrendered in negotiations. When teachers negotiate on issues such as class size, promotions, length of students' day, and when seniority clauses and not the principals' judgment determine room assignment, course assignment, transfer, and parking space assignment, then it becomes clear that discretionary actions of the administrative staff are being curbed.

Today's bargaining tables accommodate a bewildering range of topics, and yet the subject matter falls conveniently into three categories: money, time, and rights. Interestingly enough, in that order boards are inclined to give ground. Some beautiful clauses have been written into master agreements. One of the all time greats is a "matters not covered" clause which in effect says that any current practice or policy not covered by the master agreement can not be altered by the Board or administration unless it is first reviewed with teachers' association to determine if they want to negotiate it.

In the early stages there is a tendency for boards and superintendents to harbor hopes that the harsh rules of collective bargaining will somehow not apply to education. Far too late they learn that a cooperative posture at the bargaining table does not win friends, establish rapport, or moderate teachers' demands. They will tell you, in the most adamant terms, of the absolute necessity for a hard-nosed adversary posture at the bargaining table if you intend to leave it with your shirt and any semblance of control of the district's operations.

Collective bargaining has gained a fair degree of acceptance in our society, but the basic nature of the process continues to mystify and confound

the uninitiated. It is built on several remarkably durable postulates which must be accommodated if the process is to be productive. I will cite three which seem to have particular relevance for education.

First, *a genuine interdependence must exist between the parties.* Said another way, "schools need teachers and teachers need schools." Both must be restrained by the recognition that self-interest is served by keeping the enterprise going. If either party fails to recognize its dependence upon the ongoing enterprise, it will destroy the enterprise. I fear this eventuality is one that reckless and highly militant teacher groups have not sufficiently taken into account.

Second, *we must recognize that the parties have diverse and conflicting interests.* That's what bargaining is all about—resolution of conflict. Teachers want a larger share of the administration-board decision-making power. Administrators and boards want to keep what they have. Teachers want to increase tax rates for salaries and fringe benefits; boards do not. We are unrealistic to expect teachers to cooperate with management on all fronts, and we should not expect them to depart from an adversary posture unless we want them to return to the paternalism of another era. If we assume the teachers have fundamental concern with the educational process, (and surely we must), then we ought not discredit confrontation on important policies and issues.

Third, *both parties operate with certain internal and external constraints.* Internal politics, legal restraints, and public opinion set limits for bargainers. Board and administrators carry a much heavier burden than private sector management because of the public nature of their deliberations and the pressure of accountability to all citizens, including a sizable number of teachers. Policies and actions of teachers' organizations are getting an increasing amount of visibility, and one of the most serious problems for teachers today is to reconcile their idealistic precepts of professionalism with the roughhouse realities of collective bargaining.

My first recommendation to the superintendent is that he not waste energy or time trying to turn back this important and inevitable movement of teachers. It is much better that he become a student of the new power relationships, that he grasp the subtleties and dynamics of what we hope is a temporary adversary relationship. He can either look backward and try to reclaim part of the past and lose, or he can seize this privileged moment in history to shape a truly significant role for himself.

To do that, he must become more of a political animal than ever before. He must be adept at analyzing, acquiring, and using power. I suppose great superintendents have always done that instinctively. The desperation of the moment is great enough that he must do it deliberately and consciously.

For your consideration I have formulated what I believe are realistic

roles for the superintendent given the hand he has been dealt. They are based on the experiences of superintendents who have had their feet put to the fire.

Role No. 1—In the collective bargaining setting the superintendent is an agent of management. He must be the one person to whom the board confidently delegates the authority to negotiate for what the board judges to be the public interest. Boards must have accurate data and solid counsel on what is essentially educational subject matter. Boards have the right to expect the positions taken at the bargaining table to be educationally defensible and backed up by solid logic and, when appropriate, carefully organized technical data. It may well be that the superintendent's most significant role is selecting the negotiating team, which in my opinion must include principals, and leading them and the board through the stages preparatory to actual negotiations. Together they must formulate objectives, guidelines, limits, and tactics from which the board's negotiating team proceeds.

Neutrality for the superintendent is a myth. The invitation to advise teachers never comes. Why should it? Their state and national leadership has wisely developed highly sophisticated legal and research services, and the allegiance of this expertise is above question.

Role No. 2—The superintendent should not be a member of the board's negotiating team. From the standpoint of time alone he will find it impossible to exercise his total leadership role if he is tied to the bargaining table. More important, his presence at the table tends to symbolize for teachers that *he* is their adversary—an image no superintendent can be saddled with when one considers the many important relationships apart from collective bargaining that he must maintain with the staff. As a nonparticipant he is better able to keep his informal communications network open to key teachers. In many districts this has meant the difference between hopeless and often ugly impasse and a settlement.

Tactically the board's position is weakened when its executive officer is at the bargaining table positioned for the opposition to stampede him into hasty and often ill-considered decisions. Matters which the board's negotiating team can legitimately defer for study or consultation with the superintendent and board are frequently matters which the superintendent, by virtue of his position, would find embarrassingly difficult to side-step if he is at the table.

Role No. 3—After the master agreement has been negotiated, the superintendent's administrative skill is put to one of its severest tests. He and the board's negotiating team must interpret the language and terms of the contract to those administrative colleagues who must take the contract back to their buildings and make it work to the best interests of children. It is at

this critical stage that a philosophy for administering the contract emerges. It is here that a tone is set which will determine the number and nature of grievances. I have yet to see a contract so well written that is free of widely divergent interpretations.

Role No. 4—The superintendent must assume major responsibility for helping the community, the board, administrators, and the rank and file of teachers to grow in understanding of the origins, meaning, ritual, and tactics of collective bargaining. It is alarmingly easy for onlookers or the press to reach erroneous conclusions about the aggressiveness of teachers or obstinance of boards. Such impressions can have a devastating effect later when teachers and the board join hands and go to the community for higher taxes.

Role No. 5—The superintendent must exemplify and demand from subordinates moral and ethical standards of administrative function which remove any doubt teachers may have about the credibility and integrity of administrative motivations and behavior. Until teachers can "make book" on the word of the superintendent and his supporting staff, no district's negotiations are going to be free of real difficulty. In no way am I suggesting that administrators accede to the wishes of teachers or retreat from reasoned firmness. I do mean that administrators must deal from trust built on truth, not duplicity. Those superintendents who persevere the initial excesses of some teacher groups, those who steadfastly resist becoming wheeler dealers themselves eventually will have a positive and lasting effect on the attitude and rationality of teachers in the collective bargaining setting.

Role No. 6—Finally, and above all, the superintendent must use his unique vantage point to remind the combatants of the silent and infrequently mentioned third party, the children. In spite of the union's hard sell to the contrary, not all matters placed on the bargaining table serve the best interests of children. Furthermore, I believe there is a direct relationship between a superintendent's value to his district and his ability to assist others in defining and clarifying the purposes of public education. If he can keep these purposes continually before the participants at the bargaining table, he will have served the children, the teachers, and his community well.

The superintendents of this country are a hardy and resilient breed. They have been tested before. The question of their obsolescence poses no real problem for men strong enough to weather the initial excesses of collective bargaining and wise enough to turn its enormous potential into a creative and unified effort by teachers, administrators, and boards. If you can bring it off, American education is assured of experiencing the best of times.

Dispute Settlement in Public Employment

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Whether a labor dispute involves conditions of public or private employment, in an interdependent economy, the disruption and inconvenience that flow from the strike weapon are accentuated. In the post-World War II era, the American public seems to have grown increasingly impatient with the right to strike. In part, this impatience is reflected in the 1947 amendments to the Taft-Hartley Act and its eighty-day injunction which is instituted in the event of a national emergency strike. More recently, President Nixons' proposals to amend both the Railway Labor Act and Taft-Hartley Act so as to provide the President with new "options" or "additional procedures" as well as his willingness to call out the military in the postal strike are manifestations of the same pressure.

In public employment labor disputes, one confronts the firmly entrenched notion that the state is sovereign and that therefore a strike against it is unlawful. But, as the recent postal strike clearly demonstrates, we now have a wide gap between this strike prohibition contained in federal, state, and local legislation and adherence to it in actuality. The fact of the matter is that when a substantial number of workers believe they are being treated poorly and have no meaningful say in the establishment of their working conditions, laws against strikes will not deter them from engaging in work stoppages. And, we should not deceive ourselves about the extent of the problem. For public employee unionism is on the move—and, especially on the local level, the new-found militancy is on a collision course with archaic methods of public finance as well as the vicissitudes of the political process generally.

Now, I have not been invited here to speak on the right to strike as such. My own judgment is that the debate on the propriety of the strike in public employment will eventually blur the hitherto sacrosanct dividing line between the public and private spheres and thus the notion that strikes are prohibited in public employment but protected (for the most part) in private. Indeed, four years ago, I advocated the elimination of this distinction which is so largely peculiar to the United States.[1]

Today, except in the case of police and fire, there seems to be an emerging de facto right to strike in public employment—at least when the stop-

[1] See Gould, "Managing Emergency Strikes," *The New Leader,* March 14, 1966.

page is of reasonably short duration. But regardless of how this controversy is resolved, a substitute for the strike, i.e., a peaceful means of reconciling differences over the terms of a new contract, is bound to become more significant—perhaps in the private sector as well as public employment. Because the American public regards a substantial number of governmental services as essential, the urgency for the substitute is present.

When we speak of peaceful substitutes for the strike, we are generally talking about some form of mediation, fact finding, or arbitration. Mediation, or any kind of third-party assistance which does not involve recommendations or an award by an outsider, is generally the most palatable form of intervention for the parties involved in the dispute. This is because arbitration and—to a lesser extent—fact finding with recommendations involves compulsion insofar as the parties are bound by or under pressure to adhere to the dictates of a third party. For the most part, my remarks are directed to fact finding with recommendations concerning unresolved differences between the parties since that has been the most used technique during the past five years—at least in those states where legislation has been passed.

One of the greatest problems involved in establishing any dispute settlement procedure is that it can become like a narcotic—that is to say, that the parties will come to rely upon it for support when the drug is easily obtained and, in the process, their own sense of self-reliance is eroded. Therefore, a law which provides for either fact finding or arbitration must build into it a deterrence against making too frequent a use of the process—or, it should make the basis upon which the process may be obtained so sufficiently uncertain as to act as a deterrent to its use. Otherwise, collective bargaining may be undermined and the fact finder or arbitrator is confronted with an unmanageable flood of unresolved issues.

One way to cope with all of this is for the state agency administering the statute to certify that an impasse exists before permitting a fact-finding hearing to proceed—and to do so only if exhaustive bargaining resulting in a deadlock has preceded the request for third-party intervention. Another route is to impose the costs (in addition to those involved in preparation and presentation itself) of intervention upon the parties rather than the state. Wisconsin's imposition of fact-finding costs (i.e., fees and transcript costs) upon the parties may explain the lack of addiction to the process in that state—as compared with other states like Michigan where the state has undertaken the costs itself. Indeed, Michigan, in adopting the Police and Fire Fighters' Arbitration Act of 1969 which provides for compulsory arbitration upon the request of one party, has provided that the costs of arbitration be shared among the union, public employer, and the state.

This Michigan compromise is an attempt to deter parties from relying upon the process and yet not deprive organizations which might not have

adequate financial resources sufficient to bear the entire cost of arbitration. For if parties are denied access to arbitration because of its expense, the state's interest in stopping strikes may not be easily vindicated. Similarly, the certification of impasse technique is hardly satisfactory if the strike is viewed as a greater disaster than a lack of bargaining and the parties resort to economic warfare rather than good-faith bargaining. Presumably, in large part, the rationale for fact finding and arbitration flows from the notion that the strike is intolerable. Of course, in public employment, the failure to have bargained may possibly be the consequence of inexperienced bargainers on both sides rather than by design as in the case of parties operating under the Railway Labor Act. Thus, failure to require a bona fide bargaining impasse prior to use of the third-party procedure may be justifiable if we assume that fact finders and arbitrators will devise bargaining procedures for future negotiations. At this point in our experience in public employment there is yet an opportunity to correct some of the bad habits which unions and public employers have begun to acquire.

I want to return to this problem of preserving collective bargaining in the framework of third-party intervention since it is so fundamental to the future of dispute settlement in public employment. But, before doing so, I think it is perhaps important to identify some of what has gone wrong with fact finding and to suggest some improvements.

To some extent, the parties have carried their negotiating inexperience over into the fact-finding process. Since, in Michigan the hearing is normally public (indeed, the statute specifically states that it will be so), argument and testimony can become an opportunity for the union or association to engage in dramatics and histrionics for its constituency. Unfortunately, public employers which are subjected to this may often feel compelled to respond in kind. I know from personal experience that all of this can lead to polarization and, indeed, a walkout in the midst of fact finding itself. Skillful use of a prehearing conference which narrows the issues and instructs the parties as to conduct can be helpful. If this proves unsuccessful, the fact finder must have the authority to exclude the public so as to avoid showmanship and altercations. Although this runs against the grain of public interest and involvement, in certain situations there is no real alternative to exclusion.

As I stated last year when I spoke here, I believe that the outstanding defect in fact finding is its rigidity. A brief restatement of my views may be in order. Although it is unlikely that a fact finder or anyone attempting to find facts in a quasijudicial proceeding can immediately introduce himself as a mediator, attempt to work out a solution informally, and then—if he fails to achieve agreement—don his judicial robes and hear testimony, I believe that the process requires certain mediatory skills. However, I be-

lieve that the fact finder must exercise great care in determining the propitious moment for this kind of approach, i.e., subsequent to the parties having acquired confidence and trust in him and his judgment.

But this is not always possible to do. In such a case, formal recommendations are necessary. The traditional objection to the issuance of public recommendations is that it may disrupt possibilities for private settlement or that the parties will freeze into unalterable positions based upon the recommendations and that each will be forced to posture for his own constituency. The "winning" party—if there is one—may refuse to budge from recommendations or any attempt to negotiate them down. And, contrary to the Taylor Report which preceded the 1967 Taylor Law, the evidence is that "public opinion" generally fails to pressure the parties into acceptance in those cases. Surprisingly, public employers—and they seem to be more prone to reject fact-finding recommendations (although New York City is an outstanding exception to this rule)—are able to ride out most storms that come up as a result of their rejection of fact-finding recommendations.

How does one make the process less rigid and thus more settlement oriented? In my judgment, an important contribution in this area was made in proposals advanced by Professor George Hildebrand which seemed to have incorporated into law in the 1969 Taylor Law amendments. In essence, the Hildebrand proposal contemplates the issuance of two reports —one private, the other public. The benefit to be derived from this first or preliminary report takes two forms. In the first place, the parties are in a position to know the fact-finders' inclination, to understand what is realistic in terms of compliance with his report, and to respond to it without having to play to its constituency. The exchange that takes place on this basis—while the parties are aware that the threat of a public report is in the background—may prove fruitful and have the effect of narrowing the areas of difference. What is arguably more important is the case where settlement cannot be achieved on the basis of the private report and a public report thus becomes necessary. For the fact finder—who normally knows much less about the governmental enterprise than the parties themselves—can achieve a better understanding of the issues and a sensible basis for their resolution. The parties will have had an opportunity to identify his mistakes as well as the shortcomings of their own positions.

Attempting to avoid rigidity as well as seeking to preserve a viable collective bargaining system, President Nixon proposed on February 26 of this year (1970) that one of the "additional procedures" subsequent to an eighty-day injunction in the transportation industries might be a "final offer selection" procedure to be utilized in event of an emergency dispute. As one of the three options open to the President subsequent to an eighty-day injunction, the parties would be required to submit one or two "final offers"

to the Secretary of Labor. Subsequent to their submission, the parties would be given an additional five days to bargain over the proposals and if no settlement was reached, a panel of three neutrals would then be required to select one of the final offers in its *exact* form.

Last October a distinguished labor law professor advanced this same proposal to me in private conversation while we attended a conference on public employment labor disputes. Whatever the proposal's merits in the transportation industries (and I think that its use there is somewhat questionable), I have serious reservations about its workability in public employment.

Of course, the rationale for this "final offer selection" is that the parties will not hold back their ultimate positions in anticipation of an arbitraton panel which might "split the difference" and thus the workings of the collective bargaining process would not be undermined. On the contrary, the theory is that the procedure would induce the parties to be reasonable and to produce an offer which they would accept or which would lead to real bargaining during the five days. Coupled with this is the ingredient of finality—the imposition of an award which a party might not otherwise accept so that the dispute is brought to a conclusion.

In my judgment, the main virtue of this plan is its provision for "finality." The AFL-CIO has voiced its displeasure with the Nixon proposal on the ground that it is a subtle version of compulsory arbitration. But I have been deeply troubled by the substantial number of instances where fact-finding recommendations are rejected. If such recommendations can be rejected with impunity, the process will soon lose its value as an adequate substitute for the strike. At a minimum, it seems important to obligate the parties to bargain within a framework or on the basis of the report and recommendations. The Taylor Committee, in an interim report, proposed that the Taylor Law be amended in the following manner:

> The transmission of these [fact finding] recommendations, if not accepted by the parties, to the appropriate representative body for action making them binding on the parties. Such action should be taken, unless, after due consideration, including a hearing to which the parties are summoned to show cause why that step should not be taken, the recommendations are deemed to be patently unjust and arbitrary, all interests, including those of the public, considered.

But if the Nixon proposal has the virtue of finality, one may properly question its ability to induce the parties to be reasonable and to make concessions in their "final offer." Will the parties make a reasonable offer while the potential for total rejection by the impartial panel remains? The problem is compounded here inasmuch as one is confronted with the narrow group of hard cases that are at impasse where one or both parties are

likely to be obstinate, necessitating something more than mediation or fact finding. Moreover, the postal strike is simply the most recent example of the gap between union leadership and an increasingly independent, rebellious, and distrustful rank and file. The rank and file might request that the "final offer" be ratified by the membership.

How reasonable could the union be with its final offer where the workers realize that it is not the product of hard compromise (i.e., "it is all we could get fellows") and where there is not the slightest assurance that it would be adopted. The realities of collective bargaining obligate the union to be more militant when making public offers than is the case when a negotiated settlement is brought back for ratification. To some extent, one can predict union behavior in this area by observing the reaction to the employer's last offer under current Taft-Hartley procedures. The union leadership invariably opposes it—in part, because he cannot do otherwise and survive politically.

Even if the ratification procedure is not followed, would the arbitration panel be able to select an offer in the hope that it could be imposed? Moreover, whether the offer is ratified or not, the potential for dissidence makes acceptance of the employer offer—if that is the one which is selected by the arbitration panel—rather unlikely. It is just possible that a procedure in which the impartial panel is "locked into" the rigidity of one of the parties' position would begin to produce more of the same defiance of court decrees that seems so widespread in our country today.

I am not the least bit sure that a procedure which adopts one of a number of alternate positions will stand up in real practice. An agreement is the product of many factors and the third party who is able to obtain agreement must take into account a variety of complicated and shifting number of factors. And—assuming that the parties exert a good-faith effort to put forward a reasonable offer the first time around—if the parties are confronted with this procedure in a second instance, both—especially the "loser" —may be extremely reluctant to engage in this "game-playing" again.

Finally, I would like to turn to the content of the award or recommendations and the criteria that the fact finder or arbitrator ought to take into account. After all, the Nixon administration's final offer selection technique is predicated upon the notion that arbitrators will "split the difference" between the positions of the parties and that this will inhibit concessions and thus undermine collective bargaining since the more concessions that are made, the more likely it is that one's position will be compromised away by the third party. Final offer selection seeks to avoid this. If "splitting the difference" means some kind of exact compromise or fifty-fifty position between the unions and public employer final offer, the fear seems unfounded. As Doctor Edward Krinsky has noted in his dissertation on fact finding:

> . . . although the fact finder generally recommends more than what is offered by the employer, his wage recommendations are generally closer to the employers' offer than to the employees' demand. It may be argued that the fact finder 'compromises' but he does not split his recommendations down the middle.

What then does the fact finder or arbitrator take into account? Krinsky, once again, has written the following:

> It is commonplace in collective bargaining that each party looks to what it considers the best terms afforded elsewhere to support its bargaining position. If the fact finder considers the bargaining position of the parties, likelihood of their accepting the recommendations, the 'facts' of the relationship to which the parties compare themselves, the goal of ending the dispute, and the desirability of public support for the recommendations, it is unlikely that he will 'pioneer' in the size of his economic recommendations. However, he might make sizable recommendations in order to eliminate any substandard conditions brought to his attention.

Generally, the arbitrator or fact finder will hear argument and base most of his award upon considerations relating to comparability, i.e., benefits received by employees in the same geographical area doing roughly the same kind of work, as well as the financial resources which are at the disposal of the public employer. The 1969 Michigan Police and Fire Fighters' Arbitration Act provides a number of criteria which the arbitrator may utilize in fashioning his award. They are (1) the "lawful authority" of the public employer; (2) stipulations of the parties; (3) the "interest and welfare" of the public and the "financial ability" of the public employer to meet the cost; (4) comparability of conditions with employees performing "similar services" and "with other employees generally" in both public and private employment; (5) cost of living; (6) compensation presently received; (7) factors "normally" or "traditionally" taken into consideration in mediation, fact finding, arbitration, or collective bargaining in public or private employment.

Although such criteria leave the arbitrator room to measure equity as well as consider the power positions of the party, ability to pay remains the most troublesome criteria in either fact finding or arbitration cases. This is because of the hodgepodge of local property taxes upon which local government is reliant (but which do not adequately measure ability to pay), millages which quite often subject a collective bargaining agreement or award to immediate referendum, as well as state limitations upon the amount of taxes that a local government may levy. It simply does not make sense for the state to mandate collective bargaining, and, at the same time, limit the revenues available to local government unless the state itself undertakes to assist municipalities and other governments adequately.

But suppose that public employers simply defend their position on the notion that the political process will not permit higher taxes to be paid for wages which are considered equitable after other statutory criteria? In the first place, it may be that if the property tax (and its inequities) declines from its position as a primary revenue raiser, staunch resistance to tax increases will subside. But the greater probability is that political officials will always find it difficult to raise taxes when they deem it unpopular—and that tax raises will always be somewhat unpopular.

I submit that a kind of political process defense (i.e., "we can't do it because it is not politically popular") is not an adequate one in a fact-finding or arbitration proceeding. After all, one of the main functions that a third party is supposed to perform is to take political officials "off the hook" so to speak. That is to say, the political official who fears retribution at the polls because of higher taxes, can point to the bad third party who required him to raise revenues through taxes. But, in light of the number of rejections of fact-finding recommendations which we have previously noted by public employers, it may be that arbitration statutes are the best means to jump this political hurdle—at least in those occupations which are critical enough so as to justify realistic strike prohibition. If the public rejects the award, there ought to be more sensible forms of expression than millages and referenda.

And regardless of whether one has the most sensible criteria, arbitrators, and procedure, the problems of collective bargaining in public employment will continue to abound until a more sensible basis for public finance is found to exist. In part, I believe that this means that the state which has obligated local governments to engage in collective bargaining in many states must take a greater role in providing financial resources necessary for local governments to pay employees in accordance with comparability standards. Equally important is what now must be regarded as the *bete noire* of public employment collective bargaining, i.e., the phenomenon of multiunionism in municipal government. This problem has particularly taken the form of competition between police and fire on the parity issue, and it is this that prompted the Michigan Legislature to provide for intervention by a labor organization in an arbitration proceeding when it has a "substantial interest." The purpose of this statutory provision is to have wage claims heard in one proceedings so that a second arbitrator or fact finder will not permit the union which times negotiations a bit later to get a little more through this happenstance.

In my judgment, municipal governments need one bargaining table and statutes contemplating fact finding or arbitration must attempt to deal with the problem of multiunionism by integrating the wage claims involved into one proceeding. As a practical matter, this may require state legislatures to

compel a kind of coalition bargaining—that is to say a bargaining which requires all employee organizations or labor unions to come to the table at the same time and to have their demands handled at once so that the party that hangs back and waits until the first agreement is negotiated is not gaining an advantage.

In conclusion I say to you that the strike—while it seems to be an aspect of collective bargaining which interests the newspapers and television—is simply the surface manifestation of some of the problems which I have attempted to outline today. The legality of strikes in public employment is really secondary. What truly matters is whether our society deals with the structure of bargaining, questions of public finance, and whether it is willing to devise innovative methods of third-party assistance. Preoccupation with the strike's lawfulness has contributed to a growing disrespect for law and law which is empty of meaning.

When we begin to make progress in some of the areas I have noted, we will begin to get at the causes of discontent and strife. Then perhaps we will be able to say with Shakespeare:

> We must not make a scarecrow of the law
> Setting it up to fear the birds of prey,
> And let it keep one shape, till custom make it
> Their perch, and not their terror.

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Public Employment Bargaining: Current Trends Avoiding Crises—Another Approach

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There are a number of observations and conclusions I would like to make at the outset, some of which may be controversial:

- A labor relations system in public employment operated solely by public management is in the process of passing from the American scene with or without legislation.
- This development is not confined to wages and working conditions but has extended on occasion to the operations and functions of the public agency, particularly in education.
- The current degree of employee organization involvement spans a wide spectrum from informal recognition and observer status to exclusivity and bargaining on certain aspects of the functions of the agency. The pendulum is swinging from the former to the latter.
- The major public employee thrust for comparability with employees in private industry extends not only to wages, fringe benefits, and general conditions of work, but to finality in grievance procedures focused beyond the person of the public manager.
- Although hardly ever described as a model for labor-management relations in public employment, President Kennedy's 1962 Executive Order 10988 sent shock waves through many parts of the country which, coupled with the tremors and characteristics of the period (inflation–unrest), are still reverberating.
- Even the long-delayed and far more comprehensive new Executive Order 11491 is unlikely to produce a comparable impact. Except as to spur development of unfair labor practice procedures and speed the trend of separation of supervisors from nonsupervisory employees in the bargaining unit.
- The threat and the actuality of the strike will increasingly diminish past reliance for labor peace on the absence of the right to strike in public employment. It is precisely this development which causes labor experts to lock horns on the question: Can there be collective bargaining without the ***right*** to strike?
- Have penalties whether provided by statute or imposed by court order

presented or deterred strikes in public employment? The answer is "No" and "Yes," and it all depends. It has and it hasn't. What *is* clear is that such penalties constitute no guarantee against the strike. Our concentration should be on those matters, substantive and procedural, as well as those techniques and skills which most likely will reduce belief in the necessity for strike action.

● Wages and fringe-benefit disputes as in the private sector are the major cause for work stoppages in public employment. Job security as a strike issue in public employment is almost nonexistent. If wage parity with the private sector is approached, a major impetus for work stoppages would be diminished. If not, in all probability, then not. But this is far from the whole story. In the 1966-68 period, 61 per cent of all work stoppages were over wage and fringe benefits and accounted for 73 per cent of all workers involved and 83 per cent of all idleness in public employment work stoppages.

● The second most frequent cause for strikes in public employment involves union recognition and union security accounting for over 27 per cent of all work stoppages in 1968. In recent years public schools and libraries, sanitation services, hospitals, and other health services have experienced the greatest number of strikes in public employment and in that order. The number of union recognition and union security strikes in these public services are far greater than the 27 per cent of all work stoppages in this category.

● All public employment strikes do not involve unions. The BLS reports that in the past decade, strikes by nonunion public employees increased ten fold, the number of such workers involved 30 fold and the man-days idle, 200 fold.

While it is still too early to say for certain, current public employee unrest may be forcing our society to reassess the allocation of its resources, rethink its value system, and develop a greater appreciation for and use of its human resources. Critical to these potential developments is the kind and type of response by state and local governments, boards of education, and school administrators to the challenge implicit in the current unrest.

Having stated a *possibility* full of potential, permit me to make an imperative declaration: like it or not, collective bargaining or, if you prefer, collective negotiations in public employment is here to stay, to grow and to develop and in its own way. Wishful thinking on the part of too many public officials and public managers that the tide can be stemmed somehow and in some way turned back is not only self-defeating but a blueprint for chaos.

Negotiations in public employment may be a positive force for good if used to create and expand areas of freedom, participation, and experimen-

tation. It would be something less than that, particularly in education, if either or both sides use it to preserve vested interests, operating inefficiencies, and archaic concepts. It is to be expected that both parties will claim a paramount concern for the interest and welfare of society as they simultaneously press for their own prerogatives—a very normal and natural state of affairs. The mere assertion of this paramount concern, however, will not be enough. The acid test will be performance—performance in the negotiation process as well as in the bargain made. It is to this process—through which crises may be avoided—we will address ourselves.

The ultimate in these crises, I presume, is the strike, the imposition of sanctions, the group withdrawal of service, mass resignations, etc. It seems to me in the public sector even more than in the private sector, the development of acceptable substitute procedures and acceptable organizational human behavior should be the points of concentration rather than an all-consuming obsession over whether the right to strike should exist. Past experience makes clear the public's distinction between strikes as a social protest of inequitable treatment and as a "regular way of life" or automatic device. The principle of achievement by consent commands participation in the determinations both procedurally and substantively if there is to be disavowal or nonuse of economic (strike) action.

Substitute procedures for the right to strike or lockout in the private sector have developed over the years, assisted by a healthy public interest. Representation elections have largely supplanted organizational and recognition strikes. Grievance arbitration made feasible and acceptable the contractual no-strike, no-lockout commitment during the contract period. Representation elections have been formalized in the private sector with elaborate legislative and administrative procedures. Grievance arbitration was a more voluntary development stimulated by the enlightened self-interest of the parties. Today, both are highly accepted substitutes for strike action in the private sector, though not so highly accepted in the public sector. It is inevitable that the use of these substitute procedures will increase in the public sector.

While the scope of negotiable issues in the private sector has expanded over the years, this has been, for the most part, an orderly process with the recognition that the scope of bargaining *is* limited even if the line of demarcation is not always clearly defined.

The scope of collective negotiations between public bodies and public employee organizations is not nearly so clearly defined as evidenced by the wide variations in the number and types of provisions negotiated. Experience compels me to the view of the inevitability of the expanding scope of collective bargaining in public employment. Recognizing its built-in limitations just as in the private sector, I sense greater complexities in the expan-

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sion process and fear it may not be so orderly. Certainly this would be true as in some instances it has been, if the scope of collective bargaining is determined only in a crisis situation.

In the private sector, unions both organizationally and functionally react and respond to and are circumscribed by the employer (corporate) structure and initiatives. This is inevitable and acceptable to unions since it compels confrontation with the decision makers—an essential to effective negotiations. Employee organizations operating in the public sector with a membership organized along occupational lines confront a public management with something less than the full decision-making power of private corporation managers. To be sure, the authority of various governmental agencies ranges over a wide spectrum—from the local auditors' offices to the greater decision-making powers of public authorities and school districts. But even at this end of the spectrum disputes arise involving employee demands exceeding the authority of these governmental bodies—authority reposed in executive and legislative bodies. The critical challenge here is the avoidance of this type of confrontation in a crisis situation.

Negotiations and procedures such as the one I intend to mention must be consciously related to the taxing and budget-making processes of the appropriate legislative and executive bodies. Allocation of priorities must be established within this process. Timing of collective negotiations and other collective procedures thus becomes critical. The concept I refer to supports and facilitates the negotiations process and since it operates during the contract period, provides the opportunity and by its nature the flexibility conducive to this type of problem-solving. In this connection, one cannot overstress the fact that a number of issues in collective bargaining will concern joint recommendations to the appropriate legislative and other bodies.

In the private sector, it is the consumer who exercises the final power of choice. In the public sector, it is the electorate that renders final judgment on elected officials.

If you measure the scope of a negotiated agreement in public employment with one in the private sector and catalogue only by subject matter, you may be easily misled. Subject-matter titles are quite similar. One difference is in the depth and dimensions of the subject matter treated. Another is in the escape valves contained in some provisions. Still another is the binding nature of interpretations by third-party neutrals. I foresee public employee unions increasingly seeking comparability with their counterparts in the private sector in these respects and I see public managers resisting.

The dimensional scope of public employee bargaining seems to increase with the strength of the employee organization irrespective of statutory or

other regulations governing subject matter. The converse also seems to be true. The weaker the union or association, the less meaningful the scope of bargaining.

What about substitute procedures for a strike or lockout in contract negotiations when the parties reach an impasse? The more normal substitute procedures may be categorized as follows:

Fact-finding without recommendations
Fact-finding with recommendations
Mediation
Voluntary arbitration

Compulsory arbitration has not been imposed in the private sector except by a special Act of Congress and then in only two instances in modern times, but it has been in the public sector although limited. Mediation and fact-finding are by far the most widely used of the four voluntary procedures mentioned. All involve third-party intervention. Briefly, I want to deal with a procedure which is none of these. Normally, it does not operate during negotiations. It can function without third-party intervention and in the long run may have more significance in avoiding future crises in public employment than any other device we may talk about. I refer to the joint study committee (JSC)—properly conceived, structured, and executed but unfortunately up to this point in time a device little used, ill used, and misused in the public services. It stimulates in a variety of ways continuing collective discussions and joint problem exploration in the period *between* formal contract negotiations in an effort to improve and make viable the basic bargaining relationship and to avoid crisis bargaining and the pressures of the impending deadline.

Joint study committees are usually single-purpose committees assigned to gather facts, statistics, and explore alternative approaches to a given single subject or problem. On completion of its assigned task, this committee normally expires. Its assignment may be preparation for a postnegotiation effort or its work may lead to early negotiations.

Perhaps a conceptual and pragmatic contrast of the cycles in the negotiations process with the joint study committee approach may be useful. The joint study committee minimizes the institutional conflict and breast beating which dominates the early stages of nearly all contract negotiations. This traditional "grandstanding" does serve a functional purpose in negotitions: It involves blocking out the agreement zone—the exchange of information and positions while seeking and concealing preferences. However, in the joint study committee, this ritual serves no functional purpose, is unnecessary, and is thus usually discarded and usually to the relief of all.

But if the institutional conflict is down-played in the JSC approach, the

interpersonal interaction is accordingly elevated at an earlier stage than in direct negotiations and must, therefore, be sensitively dealt with. Authoritarian notions must be dispensed with and a more egalitarian posture assumed.

The tactical play which marks the negotiating game, particularly in the middle stages of the cycle, is considerably though not entirely reduced in the JSC approach. This tactical play involves position consolidation and maneuvering the opposite number in the direction of such position. Under JSC objective factors, data, analysis, and the search for multiple alternatives are more appropriate and useful devices than tactical maneuvering and positioning.

In negotiations, each party is operating openly and directly on the other's preferences and/or his perception of the negotiation environment. While such operations are not completely halted in the JSC approach, they are considerably muted since the advance commitment is to the ascertaining of objective criteria which in turn is supposed to operate on preferences and perceptions.

In negotiations, critical decisions have to be made but not so in JSC; thus the pressures which wear and tear are not as great. The conditioning of both parties under JSC often leads to startling results in subsequent negotiations.

JSC further down-plays one element of the so-called "legitimate" determinants of the outcome of collective negotiations; namely, the power relationships of the parties while upgrading the more rational realities of the environmental situation.

During collective bargaining, parties frequently "paint themselves into a corner" which inevitably leads to a frantic search for some face-saving device which may extricate them. This danger in a properly conceived and functioning JSC is practically nil since the kinds of commitment requiring undoing are rarely, if ever, made.

The desperate need for the single alternative solution to a deadlocked issue present in the negotiation process is absent in JSC since consideration can be given to several alternative solutions under any number or kinds of variables.

Finally, the need to determine the "real," but undisclosed position of the other party during contract negotiations with its resulting costs when wrong assessments are made is essentially absent in the JSC approach.

All of the foregoing assumes a properly conceived and properly functioning JSC. There are initial and latent dangers which threaten its birth, maturation, and subsequent existence. The decision cannot be unilaterally made and then imposed. Thorough discussion must precede the *agreement* to study and *what* to study. It must in fact be joint and conducted by co-

equals. The ground rules should be agreed to and clearly defined and not subject to change except by common consent. If a chairman is needed, the position should alternate between the parties at least initially—a consensus may subsequently develop on a single chairman, cochairmen, or no chairman at all. Agreement should be reached on the resources and the technical expertise to be drawn on from time to time. The membership composition of the JSC should be well thought out with each party designating its representatives hopefully influenced by the subject matter to be studied. That the JSC is not a negotiating committee should be made abundantly clear. The frequency and regularity of meetings should be frankly discussed; the time of day sessions are to be held should be determined as well as what compensation, if any, is to be paid and if so by whom. Flexibility, adaptability, and informality should characterize the functional operations of the committee. Freedom of expression without personal commitment is essential if there is to be meaningful dialogue and if attitudes and perceptions are to change and alternate routes examined as information and data expand. This, of course, poses reporting problems including the advisability of even summary minutes and then, if so, in what form.

Despite all I have said, there is one essential truth I must leave with you: In collective bargaining or collective negotiations, there is no "magic formula." To assume there is, is to engage in self-delusion and employee-management mythology. If it is true the only constant in life is change itself, its application to this process is complete. Since the major component of collective negotiations is human relations, and since we know less about human behavior than almost anything else, rigidity must be avoided and adaptability the constant order of the day.

One thing we do know is that the eternal struggle for accommodation between the order-giver and the order-taker—with its roots deeply embedded in the basic human need for recognition, participation, and expression—has a special significance in public employment. This accommodation cannot be made unless dignity is accorded. The complexities of today's society —and the fear of isolation from the centers of decision—accentuate and sharpen this human need for recognition and help explain in part this restlessness not only among public employees but in our society in general.

These are some of the underlying motivations which give urgency to the drive for collective bargaining and recognition and the more pragmatic group expressions known as employee demands and complaints.

The antithesis of these employee motivations are those fears among management of some diminution of self-worth, esteem, and position more pragmatically expressed as management prerogatives as near divine rights—some of which have proved as illusory and transitory as those of yesterday's kings. Others have survived because they are fundamentally sound and

functionally operative. Still others remain in doubt.

Improvement is a necessity in the organization and channeling of not only discontent in a form and in a forum where it can be expressed and dealt with rationally and with sensitivity but also in the form and forum for realizable hopes and aspirations. The goal is an accommodation to the emotional and pragmatic needs not of one party but of both parties and this is dependent upon a viable relationship. It is to the viability of this relationship that we commend the continuing and imaginative search for rational alternatives to naked conflict.

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